91-982

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY REPRESENTED BY THE UNITED TRANSPORTATION UNION, THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, THE BROTHERHOOD OF AIRLINE CLERKS AND THE BROTHERHOOD OF RAILWAY CARMEN,
Petitioners,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and the BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date: December 19, 1991

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QUESTIONS PRESENTED

1. Can the Interstate Commerce Commission apply the review power it adopted in April, 1987, in the case of *Chicago & Northwestern Transportation Co./Abandonment*, 3 ICC 2d 729 (1987) (the so-called "LACE CURTAIN" case) to retroactively reverse an arbitration award issued over three and one-half years earlier (September, 1984) in such a fashion as to deprive railway employees of *New York Dock* benefits awarded by the arbitration panel without affording the employees due process and, basically, making the employees efforts in the intervening three and one-half years to continue through the arbitration process and the enforcement process in the U.S. District Courts a complete waste of time and money?

2. Does the Interstate Commerce Commission in the exercise of its quasi-judicial power to review arbitration awards possess a greater power under the Interstate Commerce Act, specifically 49 U.S.C. § 11351, to substitute its own findings of fact and determinations of causation for those of the arbitration panel than do federal courts (U.S. District Courts or Circuit Courts of Appeal) in reviewing arbitration cases under federal statutes such as the Railway Labor Act, 45 U.S.C. § 153 FIRST(q)?

3. Have the Circuit Courts of Appeal decided, inconsistently, an important question which has not been, but should be, settled by this Court with regard to the jurisdiction and scope of review of arbitration awards by the I.C.C. as compared to the power of federal courts to review arbitration awards?

LIST OF PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

UNITED TRANSPORTATION UNION, TRAINMEN & ENGINEMEN, LOCAL 887 (UTU), an unincorporated association; UNITED TRANSPORTATION UNION (UTU), an international labor organization; W. R. JONES, TOM DEWING; J. O. GALBRAITH; C. W. SCHUTTY; S. J. THOMAS, JR.; R. G. FRIGAARD; B. L. MAES; R. S. McKAY; D. E. MEIER; R. F. LAPPIN; R. V. SEWARD; F. H. LATHROPE; B. L. DAVIDSON; M. N. DAY; CON HEALY; E. R. KENDALL; A. J. MENGON; H. P. FOLEY; D. A. SCHAEFER; S. J. DIRA; G. R. MILLER; H. N. VERLANIC; C. C. WRIGHT; W. E. GALLAGHER; F. J. JURCICH; N. J. RUCKMAN; J. J. WALSH; N. J. VIOLETTE; L. A. BAZZANELLA; C. M. JESSEN; T. F. BRAY; L. R. HORSFALL; and R. R. McLEAN, employees of the Butte, Anaconda & Pacific Railway Co. represented by the United Transportation Union, and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL No. 2615 (BMWE), an unincorporated association; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES (BMWE), an international labor organization; ROBERT J. ANDREOLI, MARK BALKOVATZ, J. E. BECKHAM, J. R. BENNINGER, ROBERT BENNER, S. A. BLASKOVICH, B. J. BURNS, JOHN J. BUTTON, PEARSE J. CANNON, ARTHUR CARLE, JR., NICK COOK, VERNON C. COOK, WILLIAM CORCORAN, I. DEMAROIS, CHARLES F. DEVINE, JAMES J. DOLAN, THOMAS F. EDWARDS, EDWIN I. FORSMAN, M. P. GALLAGHER, HENRY GONZALES, S. O. GONZALES, D. V. HAGAN, JOHN HOLMLUND, C. C. JOHN-

SON, C. J. JUNTUNEN, JOHN E. KELLY, THOMAS J. KLEMANN, JOHN P. KOPP, RONALD M. KOPP, H. P. LORELLO, PATRICK R. LORELLO, JOSEPH E. MACIAG, GARY M. MAKI, R. E. MAKI, J. O. MARCILLE, P. J. MONAHAN, R. J. MONAHAN, KEVIN McCARTHY, S. T. McCARVEL, ROBERT D. NEARY, GEORGE J. NILAND, J. M. PATRICK, R. E. PETERSON, ANTHONY PIPINICH, J. A. PIPINICH, JACK PORTER, JR., KENNETH J. PORTER, MARK A. PROXELL, EDWARD C. QUANE, RICHARD F. QUINN, RICHARD W. QUINN, D. N. RUSTAD, G. J. SMET, JR., W. A. SMITH, L. H. SNOW, J. J. STERGAR, D. P. SULLIVAN, D. J. SWANSON, R. D. SWANSON, DAN J. THOMAS, LAWRENCE F. THOMAS, JAMES W. TUSS, CHRIS R. VUICICH, S. J. VUICICH, F. L. WALSH, MIKE B. WELCH, GREGORY WYANT, JERRY J. WYANT, WESTON J. WYANT, NICK YALOVICH, SCOTT A. ZEIER, employees of the Butte, Anaconda & Pacific Railway Company represented by the Brotherhood of Maintenance of Way Employees, and

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, MT. HAGGIN LODGE, No. 1327 (BRAC), an unincorporated association; BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS (BRAC), an international labor organization; VICKI BECKHAM, L. C. BIGGS, J. H. DEVINE, BERNARD FRIEZ, GARY J. JACOBSON, LOIS ANN JONES, HENRY J. KLOBUCAR, ROGER LOFING, ROBERT MAEHL, J. T. McCOLLOM, GERALD J. O'BRIEN, ARLANA L. PATTON, J. E. PUYEAR, THOMAS J. ROWE, NORMAN A. RUSTAD, FRANK J. SESTRICH, ANTHONY G. SOLAN, MARGARET VOSCAMP, V. M. ZEIER, employees of the Butte, Anaconda & Pacific Railway Company represented by the Brotherhood of Railway and Airline Clerks;

BROTHERHOOD OF RAILWAY CARMEN, BALDY LODGE No. 81 (BRC), an unincorporated association; BROTHERHOOD OF RAILWAY CARMEN (BRC), an international labor organization; JACK ANDREOLI, DENNIS BARCLAY, STEVE BLASKOVICH, V. C. COOK, JR., MIKE GREENE, TERRY HAGAR, JUNE HOCHSTRASSER, JAMES JORGENSEN, T. P. KAVRAN, CARMINE MASELLA, WILLIAM NILAND, TERRY NORBERG, FRANK RANALLY, JOHN STURM, employees of the Butte, Anaconda & Pacific Railway Company represented by the Brotherhood of Railway Carmen;

THE UNITED STATES OF AMERICA; and THE INTERSTATE COMMERCE COMMISSION;

THE ATLANTIC RICHFIELD COMPANY (ARCO), a Delaware corporation; THE ANACONDA COMPANY, a Delaware corporation, a wholly owned subsidiary of ARCO; and THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a Montana corporation, a wholly owned subsidiary of ARCO.

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EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY REPRESENTED BY THE UNITED TRANSPORTATION UNION, THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, THE BROTHERHOOD OF AIRLINE CLERKS AND THE BROTHERHOOD OF RAILWAY CARMEN,
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PETITION FOR A WRIT OF CERTIORARI

The Employees of the Butte, Anaconda and Pacific Railway Company (hereafter "BA&P") represented by the United Transportation Union (hereafter "UTU"), *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. The decision of the court of appeals is reported at 938 F.2d 1009 and is reproduced herein as Appendix A at 1a-13a.

2. The Arbitration Review of the Interstate Commerce Commission which was issued September 12, 1989, is reproduced herein as Appendix B at 14a-34a.

3. The Decision of the Interstate Commerce Commission which had a service date of March 2, 1988, is reproduced herein as Appendix C at 35a-54a.

4. The Decision of the Interstate Commerce Commission which had a service date of May 20, 1980, is reproduced herein as Appendix D at 55a-60a.

5. The Order of the Interstate Commerce Commission which had a service date of January 17, 1978, is reproduced herein as Appendix E at 61a-66a.

6. Memorandum Order and the Judgment of the United States District Court for the District of Montana, Butte Division, filed March 2, 1983 which was not appealed and which was not reported, is reproduced herein as Appendix F at 67a-75a.

7. Phase Two "Order" of arbitration panel sitting under *New York Dock II*, Appendix III, (Jack W. Cassle, Neutral), dated July 7, 1985, is reproduced herein as Appendix G at 76a-86a.

8. "Nunc Pro Tunc Order" issued by arbitration panel under *New York Dock II*, Appendix III, (Jack W. Cassle, Neutral), dated February 6, 1985, is reproduced herein as Appendix II at 87a-88a.

9. Phase One "Order" of arbitration panel under *New York Dock II*, Appendix III, (Jack W. Cassle, Neutral), dated September 26, 1984, is reproduced herein as Appendix I at 89a-109a.

10. "Order Granting In Part And Denying In Part The Carrier's Motion To Dismiss" of arbitration panel under *New York Dock II*, Appendix III, (Jack W. Cassle, Neutral), dated February 3, 1984, is reproduced herein as Appendix J at 110a-112a.

11. "Order Granting UTU Motion For Bifurcation And Denying BAP Motion To Compel Disclosure Of Information Under Section 11(e), Appendix III", of arbitration panel under *New York Dock II*, Appendix III, (Jack W. Cassle, Neutral), dated December 15, 1983, is reproduced herein as Appendix K at 113a-116a.

JURISDICTION

The decision of the court of appeals was entered on July 10, 1991, and petitioners' timely request for rehearing was denied on August 21, 1991. (Appendix L at 117a-118a). Petitioners sought and were granted on November 8, 1991, an extension to and including December 19, 1991 to file this petition. (Sup. Ct. No. A-328). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the proper interpretation of the power of the Interstate Commerce Commission to issue supplemental orders for the purpose of reversing an arbitration award under the Interstate Commerce Act, specifically 49 U.S.C. § 11351, and the relationship of that section to the power of federal courts to review arbitration decisions under the Railway Labor Act, specifically 45 U.S.C. § 153 First (q). Those statutory provisions, as well as other applicable portions of the Interstate Commerce Act, 49 U.S.C. § 11343-11345 and 49 U.S.C. § 11347, are set forth in Appendix N at 134a-157a.

STATEMENT OF THE CASE

This case arises out of the efforts of the petitioners to obtain job protection benefits granted to them under the Interstate Commerce Act, specifically 49 U.S.C. § 11347

set forth in Appendix N at 144a-145a. Petitioners contend they were entitled to these benefits as a result of the acquisition of the Butte, Anaconda & Pacific Railway Company (hereafter "BA&P") by the Atlantic Richfield Company (hereafter "ARCO") pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. § 11343, *et seq.* (Appendix N at 134a-144a). The Petitioners were awarded job protection benefits by an arbitration panel sitting pursuant to the arbitration clause delineated in Appendix III of the "*New York Dock* conditions" which had been set down by the Interstate Commerce Commission (hereafter "I.C.C.") in *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979). Three and one-half years after the arbitration panel had ruled in favor of the petitioners' claim for job protection benefits, the I.C.C. reversed the arbitration award and subsituted its findings of fact for those of the arbitral panel pursuant to the review power that it had adopted in *Chicago and Northwestern Transportation Company/Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called "Lace Curtain case"). This reversal of the arbitration panel award by the I.C.C. was appealed to the Ninth Circuit Court of Appeals in *Employees of the Butte, Anaconda & Pacific Railway Company, et al. v. United States of America, et al.*,[1] 938 F.2d 1009 (Appendix A, 1a-13a) where the I.C.C. orders were affirmed.

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[1] This case was a consolidation of three separate petitions for review of orders of the I.C.C. Cause 88-7138 was brought by Employees of the BA&P represented by the Brotherhood of Maintenance of Way Employees (hereafter, "BMW&E"), Brotherhood of Airline Clerks (hereafter, "BRAC"), and Brotherhood of Railway Carmen (hereafter, "BRC") seeking review of an arbitration award issued by Joseph A. Sickles, a one-man arbitral panel. Cause 88-7162 was brought by Employees of BA&P represented by UTU to review the decision of the I.C.C. served March 2, 1988 (Appendix C at 35a-54a). Cause 89-70504 was brought by Employees of BA&P represented by UTU, BMW&E, BRAC and BRC seeking review of the decision of the I.C.C. issued September 12, 1989 (Appendix B at 14a-34a).

The actions of the I.C.C. and the affirmance of those actions by the Ninth Circuit raise important issues concerning the jurisdiction of the I.C.C. to reverse arbitration awards by substituting its own findings of fact and determination of causation for those of the arbitral panel and defining the scope of review to be employed by the I.C.C. under the Interstate Commerce Act as compared to the scope of review employed by federal courts reviewing arbitration awards under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Important issues are also raised as to whether or not the I.C.C. exercised retroactively its review powers on an arbitral award that had been issued long before it had adopted its review policy without affording petitioners due process and unfairly having allowed petitioners to proceed through almost two additional years of arbitration proceedings and lengthy court proceedings at a great deal of time and expense.

A. The Cassle Panel Arbitration Process

During 1976, ARCO acquired ownership of The Anaconda Company, a Montana corporation, and two of its wholly owned subsidiary railway corporations—the BA&P and the Tooele Valley Railway (hereafter, TOV"). This acquisition of two or more "carriers" by a noncarrier required the approval of the I.C.C. pursuant to 49 U.S.C. 5(2)(f) which is now codified as 49 U.S.C. § 11343 *et. seq.* ARCO formed a new corporation known as The Anaconda Company, a Delaware corporation, into which it merged The Anaconda Company, a Montana corporation.

ARCO and Anaconda-Del. filed an application with the I.C.C. to obtain approval of the acquisition of BA&P. The I.C.C. approved this application in an Order served January 17, 1978 (Appendix E at 61a-66a). Subsequently, the I.C.C. reopened this matter and conditioned the approval on the condition that BA&P extend the protective conditions delineated in Appendix III, *New York Dock-Control-Brooklyn Eastern District Terminal,* 360

ICC 60 (1979) to employees of BA&P adversely affected by this "transaction". This order was dated May 20, 1980. (Appendix D at 55a-60a).

In 1982, employees of BA&P represented by UTU complained they had been adversely affected in their employment so as to warrant imposition of the *New York Dock* protective conditions. When BA&P refused their requests, arbitration was requested as the dispute resolution procedure of the *New York Dock* conditions. An arbitration panel was selected with Jack A. Cassle sitting as Neutral (hereafter "Cassle Panel").

Before the panel could commence, BA&P filed an action in the U.S. District Court for Montana seeking an injunction to prevent arbitration by contending that the *New York Dock* conditons did not apply to the claims of the UTU employees. The U.S. District Court granted summary judgment for the employees. (Appendix F at 68a-75a). The U.S. District Court defined the issue to be arbitrated as follows:

> The issue ultimately to be decided is whether the necessary causal nexus exists between the transaction and the BA&P's reduction in force. (Appendix F at 72a).

Following the proceeding in the U.S. District Court the case proceeded through a pre-arbitration process. A motion was made by the UTU to bifurcate the hearings into a liability phase and a damage phase. In granting this motion Arbitrator Cassle also defined the issues to be considered by the panel which mostly went to the issue of causation. Appendix K at 113a-116a).

On January 19, 1984, at the conclusion of the evidence presented by the UTU, the BA&P moved to dismiss all claims on the basis that no causal connection had been shown by the UTU. On February 3, 1984, Arbitrator Cassle ruled on this motion in writing. (Appendix J at 110a-112a). Basically, he ruled that some of the occur-

rences relied on by the UTU were dismissed for failure to prove a causal nexus but the majority of occurrences related to the "transaction" had been proven to demonstrate a causal connection between the incidents complained of and employees being placed in a worse position with respect to their employment.

After the BA&P had presented their case, the panel issued its Order dated September 28, 1984 finding in favor of the UTU employees on the issue of liability. (Appendix I at 89a-109a).

At this time the BA&P filed a "Petition to Reopen and Clarify" with the I.C.C. in which they specifically represented to the I.C.C. they were not seeking review of the award of the Cassle panel. They also filed a complaint in the U.S. District Court for the District of Wyoming seeking to set aside the Cassle award. This case was transferred to Montana, Cause CV-85-83-BU, and stayed by the U.S. District Court pending a "final" order from the panel after the damage hearings were finalized. No action was to be taken by the I.C.C. for a period of *years* on the BA&P's petition.

Due to the actions of the BA&P in making collateral attacks on the liability order, a *Nunc Pro Tunc* Order was issued by the panel on February 6, 1985. Appendix H at 87a-88a). This order was issued to clear up the confusion that BA&P claimed existed as to causation. The panel ruled:

* * *

3. The January 17, 1978, Order of the I.C.C. is a "transaction" within the definition of 49 U.S.C. 5(2).

4. A direct causal connection exists between such transaction and the job changes and reductions complained of by the members of the organization herein.

5. Therefore, the employees who have been affected by such job reductions are entitled to receive those protective benefits ordered by the I.C.C. in its later modification of the approved Order which imposed the *New York Dock* conditions.

(Appendix H at 88a)

The damage portion of the hearings was conducted thereafter over the next eighteen months. The BA&P denied damage claims based on certain defenses which were ruled upon by the panel on July 7, 1985. (Appendix G at 76a-86a). The final monetary award was issued on May 22, 1986.

Once this award was final, the UTU filed an action in the U.S. District Court in Montana to enforce this award. (Cause CV-86-145-BU). This case was consolidated with the earlier BA&P action seeking to set aside the liability award. These two cases proceeded through the pleadings process. Both sides moved for summary judgment and briefed the matter fully. The I.C.C. had been fully advised of these proceedings but waited until the final hearing before seeking to intervene. At this time they disclosed that the I.C.C. was considering ruling on the "Petition to Reopen and Clarify" that the BA&P had filed in December of 1984, which was not acted upon in the intervening *twenty-seven months* while the parties had been working on the damage phase of the arbitration case and the two actions in U.S. District Court. At this point even the BA&P argued to the U.S. District Court that the I.C.C.'s snail's pace was not a sound basis for allowing intervention at this point in time. However, in an attempt to protect the BA&P employees, a "Petition to Intervene" was filed with the I.C.C. requesting the right to intervene if the I.C.C. was going to act on the BA&P petition that had been filed almost two and one-half years earlier.

Seven months later the I.C.C. issued an order dated March 2, 1988, which reversed the liability award issued

by the Cassle panel in favor of UTU members. In this same order the I.C.C. ruled that these employees were granted the right to intervene. (Appendix C at 35a-54a). However, due to the timing, the UTU members were not allowed to be heard on the merits prior to the reversal order being served. This order was the subject of a "Petition to Reconsider" filed with the I.C.C. by the UTU. This same order was the subject of a petition to review filed with the Ninth Circuit Court of Appeals (Cause No. 88-7162) which was one of the three consolidated actions in that forum. (Appendix A at 1a-13a). The basis for jurisdiction in the Court of Appeals was 28 U.S.C. § 2321(a) and 28 U.S.C. § 2342(5).

B. The Sickles Panel Arbitration Process

After the Cassle panel had issued its liability award on September 26, 1984, three other labor organizations representing BA&P employees requested arbitration claiming *New York Dock* protection. The BMW&E, BRAC and BRC selected Joseph A. Sickles to sit as an arbitrator of one (hereafter, "Sickles Panel").

The identical facts and issues were presented to the Sickles panel as had been presented to the Cassle panel by the UTU. As a matter of fact, the entire record of the Cassle panel was accepted into evidence on the issue of liability. In February of 1988, the Sickles panel ruled in favor of the BA&P and against the labor group. Based on this ruling a petition was filed with the I.C.C. to review this award due to the fact that the I.C.C. had proclaimed its "review power" in *Chicago and Northwestern Transportaiton Company/Abandonment*, 3 ICC2d 729 (1987) (the so-called "Lace Curtain case") the year before. This decision was also appealed to the U.S. Circuit Court of Appeals for the Ninth Circuit (Cause No. 88-7138) and was the second of the three matters consolidated for decision there. The jurisdictional grounds were, again, 28 U.S.C. § 2321(a) and 28 U.S.C. § 2342(5).

C. The I.C.C. Orders

In the order served March 2, 1988 (Appendix C at 35a-45a), the I.C.C. reversed the decision of the Cassle panel. In this order the I.C.C. admits that it substituted its own finding of causation for those of the Cassle panel as follows:

> In CNW, *supra*, 3 ICC 2d at 736, we stated we will not review factual issues of causation. These issues are best left to the arbitrator. Here, however, the Neutral's determination of causation issues was based on the flawed premise the Commission intended *New York Dock* benefits imposed in the control transaction to cover any and all future effects on BA&P employees. As we stated above, the Neutral misinterpreted the Commission's intentions. His conclusions, particularly on post-transaction job changes are thus faulty and the facts need to be reevaluated.

(Appendix C at 51a)

The UTU felt that the I.C.C. had substituted its own determinations of fact for those of the arbitral panel. For example, the I.C.C. based its March 2, 1988 order on the premise that ". . . no employees were adversely affected following the acquisition until after the precipitous decline in the market for copper in late 1979." (Appendix C at 49a). This was not the finding of the Cassle panel. The panel had *awarded* damages for adverse effects occurring as early as 1978. For this reason the UTU filed a petition with the I.C.C. to reconsider while at the same time appealing this order to the Ninth Circuit as stated above.

On September 12, 1989, the I.C.C. issued a two-part Order. The petition to reconsider the March 2, 1988 order was denied. The petition to review the Sickles award was denied. This order was appealed to the Ninth Circuit Court of Appeals (Cause No. 88-70504) and constituted the third consolidated matter on appeal therein.

Jurisdiction was based on 28 U.S.C. § 2321(a) and 28 U.S.C. § 2342(5).

D. Court of Appeals' Decision

The decision handed down in this case affirmed the I.C.C.'s orders because the Ninth Circuit ruled that the Commission did not act arbitrarily or capriciously. The Court did not feel the I.C.C. had substituted its finding of fact or determination of causation even though the I.C.C. had admitted in its orders that it had done so. (Appendix C at 51a and Appendix B at 19a and 21a-23a).

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the proper application of the powers of the I.C.C. to review arbitration awards rendered under employee protection plans promulgated by the I.C.C. pursuant to 49 U.S.C. § 11347. In the *LACE CURTAIN* case (Appendix M at 119a-133a), the I.C.C. adopted standards of review. This Court should review this case to determine whether in fact those standards of review were blatantly violated.

In addition, this case presents a situation which demonstrates that the I.C.C. claims the jurisdiction and power to review arbitration awards under the statutory authority of the Interstate Commerce Act, specifically 49 U.S.C. § 11351, so that it can substitute its findings of fact and determination of causation for those of the arbitrator in violation of its own standard of review which is based on the *Steelworkers Trilogy*.[2] This power was exercised in this case by the ICC, exercising a quasi-judicial function, in a much broader manner than the courts themselves could have acted in reviewing an arbi-

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[2] This Court has set down the proper standards of review for arbitration cases in: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tration award such as exercising its power under the Railway Labor Act, 45 U.S.C. § 135 FIRST(q).

Lastly, the various Courts of Appeals have decided this important question of federal law in an inconsistent fashion which should be settled by this Court so that a clear and uniform direction will be provided for courts, administrative agencies and labor organizations alike. This Court should grant the writ in this case and give the lower courts the needed guidance on this important issue.

I. THIS CASE PRESENTS IMPORTANT ISSUES AS TO THE EXERCISE OF THE I.C.C.'S REVIEW POWER, ADOPTED IN THE *LACE CURTAIN CASE*, RETROACTIVELY TO DEPRIVE RAILWAY EMPLOYEES OF *NEW YORK DOCK* BENEFITS

The Cassle award was handed down on September 26, 1984. (Appendix I at 89a-106a). No party made any request to the I.C.C. to review this award. On December 11, 1984, the BA&P filed a petition to reopen and clarify which specifically recited that no review was being requested. A complaint had been filed in the U.S. District Court in Wyoming for that purpose. This petition was not acted upon until March 2, 1988 (Appendix C at 35a-45a) when the Cassle award was reversed. In the intervening three and one-half years, *all* parties before the Cassle panel (BA&P and UTU alike) continued to proceed through the arbitration process due to the fact that the proceeding had been bifurcated into a liability phase and a damage phase. Endless hours were spent preparing witnesses and exhibits, holding hearings with the arbitrator and computing awards. The final award documents were signed in May, 1986, some twenty-one months after the liability award was issued and almost *one year* before the I.C.C. adopted a review power in *LACE CURTAIN*.

Following the final award, actions were commenced in the U.S. District Court for the District of Montana

(Cause CV-86-145-BU) to enforce the award by the UTU. The BA&P removed the stay from the action it had filed in 1984 to obtain judicial review of the Cassle award (Cause No. CV-85-83-BU) and the U.S. District Court consolidated these actions. The parties proceeded through the pleading and discovery phases at a great deal of time and expense until the court decided the cases were ripe for decision based on cross-motions for summary judgment. There had been a very costly and time consuming expenditure of resources and man-hours in bringing these cases to this point.

At this point in time, the I.C.C. handed down its decision in *LACE CURTAIN* indicating it had the power to review arbitration awards. The Cassle award on liability was two and one-half years old at that time. There was no indication to the parties to this dispute or the public at large that the I.C.C. intended to apply this power retroactively to "old" arbitration awards or to cases where no parties to the dispute *requested* such a review. There was no indication to the BA&P or the UTU that the Cassle order of September, 1984, was to be reviewed.

In *Norfolk & Western Railway Co. and New York Central and St. Louis Railway Co.*—Merger, 5 I.C.C.2d 234 (1989) the I.C.C. itself addressed the timely appeal of arbitration awards. The holding dictated that a 20-day statutory period existed within which review must be requested by one of the parties to obtain review of an arbitration award. No such request was *ever* made in the case before this Court.

As matters proceeded before the U.S. District Courts in Montana, the I.C.C. suddenly moved to intervene announcing it was going to review the Cassle award based upon the petition the BA&P had filed in December, 1984, seeking "clarification" of the *New York Dock* conditions. At this time, the BA&P opposed the I.C.C. motion arguing that the failure to act in a *timely* fashion

on their petition could not justify a delay in proceedings that both BA&P and UTU had diligently pursued.

The UTU was not a party to the proceedings in front of the I.C.C. when the original acquisition order was handled (Appendix E at 61a-66a). The UTU was not a party when that order was modified (Appendix D at 55a-60a). The UTU was not a party to the proceeding instituted by the BA&P's "clarification" petition in 1984. The parties were ARCO, Anaconda Co. (Delaware) and the Railway Labor Executive's Association (RLEA). For this reason, the UTU filed a petition to intervene should the I.C.C. decide to rule on the "clarification" petition which was two and one-half years old. This petition was granted but not until the March 2, 1988 order (Appendix C at 38a-53a).

The actions of the I.C.C. in retroactively applying the review powers adopted in *LACE CURTAIN* to the instant case were arbitrary, capricious, an abuse of discretion, in excess of statutory jurisdiction, authority or limitations or short of statutory right, in violation of 5 U.S.C. 706(2)(A) and (C) which require correction by granting this writ. The failure to allow the UTU the opportunity to intervene in a timely fashion to challenge the "trial de novo" conducted by the I.C.C. and the findings of fact substituted for those of the Cassle panel constituted a deprivation of due process under the Fourteenth Amendment to the U.S. Constitution and requires granting this writ.

II. THE I.C.C. HAS CLAIMED A BROADER STANDARD OF REVIEW THAN COULD BE EMPLOYED BY THE COURTS BY ASSERTING THAT PURSUANT TO 49 U.S.C. § 11351 IT CAN SUBSTITUTE ITS FINDINGS OF FACT AND DETERMINATIONS OF CAUSATION FOR THOSE OF THE ARBITRATOR

When the I.C.C. adopted its review powers in *LACE CURTAIN* it positively stated that it adopted the standard of review set down in the *Steelworkers Trilogy* (Ap-

pendix M at 130a) and that "we do not intend to review arbitrator's decisions on issues of causation, the calculation of benefits or other factual questions." (Appendix M at 130a). This statement by the I.C.C. was relied heavily upon by the District of Columbia Circuit in upholding the I.C.C.'s review authority in *International Brotherhood of Electrical Workers v. I.C.C.*, 862 F.2d 330, 337, (D.C. Cir. 1988).

In the Ninth Circuit Court of Appeals decision, the Court ruled that the I.C.C. did not substitute its findings for those of the Cassle panel (Appendix A at 12a). This is a most interesting aspect of that decision because the I.C.C. had admitted that it had reevaluated the facts and made its own determination on causation. In the March 2, 1988, order the I.C.C. stated:

> The Neutral considered 14 such incidents as "transactions" for which *New York Dock* benefits were awarded to BA&P employees. These included the examples noted by the UTU above, as well as instances of traffic diversions and operational changes. He also considered the control transaction itself. The Neutral determined that a causal nexus was established in 13 incidents and ARCO's acquisition of BAP, and thus *New York Dock* benefits were due BAP employees.
>
> In CNW, *supra*, 3 I.C.C. 2d at 736, we stated we will not review factual issues of causation. These issues are best left to the arbitrator. Here, however, the Neutral's determination of causation was based on the flawed premise that the Commission intended *New York Dock* benefits imposed in the control transaction to cover any and all future effects on BAP employees. As we stated above, the Neutral misinterpreted the Commission's intention. His conclusions, particularly on post-transaction job changes are faulty and the facts need to be reevaluated.

(Appendix C at 51a)

In the September 12, 1989 order (Appendix B at 14a-34a), the I.C.C. demonstrated that it conducted a "trial de novo" when it indicated that it based its factual conclusions on the verified statement of BA&P President John W. Greene which was *uncontradicted before the I.C.C.* (Appendix B at 23a). Naturally, since the UTU had not been allowed to intervene until the day the Cassle award was reversed, there was no opportunity to dispute that statement before the I.C.C. However, that position was disputed before the Cassle panel by UTU evidence which the panel accepted as more persuasive on this point. The BA&P had argued that all job changes occurred solely in response to the economy. The UTU disputed this point with testimony and documentary evidence. The panel ruled:

> The BA&P in its presentation, has sought to avoid payment of *New York Dock II* benefits on the theory that the reductions in work force subsequent to the acquisition of BA&P occurred solely in response to changes in the economy of the copper industry and that such reductions were not related, in any way, to the acquisitions which constituted an agreed-upon transaction.
>
> Such a position is without merit in light of the above cited applicants' submissions to the I.C.C. and the reasonable conclusions and expectations to be drawn therefrom.

(Appendix I at 102a).

Both the I.C.C. and the Ninth Circuit felt that 49 U.S.C. § 11351 gives the power to the Commission to issue supplemental orders any time that "good cause" is demonstrated. (Appendix A at 10a, Appendix B at 19a and Appendix C at 43a-44a). This statute may be deemed to authorize issuance of a "supplemental order" but when the nature of that order seeks to *reverse* an arbitration award the jurisdictional power conferred should not be deemed to exceed that generally possessed for purposes of arbitration review.

The I.C.C. had concluded that the award of the Cassle panel "failed to draw its essence from the conditions imposed by this agency" as well as having "exceeded the limits of its authority as defined by the *New York Dock* conditions". (Appendix A at 7a and Appendix C at 46a). Then using its power to "supplement", the I.C.C. found its own facts and made its own determination of causation. (Appendix C at 49a-52a).

The standards of review generally accepted and clearly stated in the *Steelworkers Trilogy* do not confer this power on reviewing courts and it should not be conferred upon administrative agencies exercising quasi-judicial functions of reviewing arbitration awards.

Prior to 1987, the I.C.C. excluded itself from the arbitration area and gave deference to the expertise of arbitrators. *Haskell H. Bell v. Western Maryland Railway*, 366 ICC 64 (1981) and *Leavens v. Burlington Northern*, 366 ICC 962 (1977). The policy had been carefully articulated in *Walsh v. United States*, 723 F.2d 570, 575 (7th Cir. 1983) that when arbitration was specifically prescribed the I.C.C. no longer had authority to act. This policy changed with the *LACE CURTAIN* rule which adopted the review standards of *Steelworkers Trilogy* and *Wallace v. Civil Aeronautics Board*, 755 F.2d 861 (11th Cir. 1985). The I.C.C. relied heavily on *Loveless v. Eastern Airlines*, 681 F.2d 1272 (8th Cir. 1982) in support of its review power. The *Loveless* decision concluded that in reviewing arbitration awards a decision could only be overturned on the narrow standards set down in the Railway Labor Act, 45 U.S.C. § 153 FIRST(q). (681 F.2d at 1276). Those grounds are limited to:

(1) Whether the award is irrational.

(2) Whether the award draws its essence from the letter or purpose of the collective bargaining agreement.

(3) Whether the arbitrator conformed to a specific contractual limitation on his power.

Loveless, 681 F.2d at 1276.

The standard was further discussed in *Armstrong Lodge No. 762 v. Union Pacific*, 783 F.2d 131, 135 (8th Cir. 1986) where it was held that not only must be limited standards of the Railway Labor Act apply but that the Court cannot set aside a decision of an arbitration even if it would have reached a different decision in the first instance.

In *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969) the rule was set down that if the arbitrator's decision draws its essence from the agreement and the rationale can be determined for the decision, it must stand. In *Ferrick v. Baltimore and Ohio Railroad Co.*, 447 F.2d 89 (3rd Cir. 1971) the principles set down in *Ludwig* were determined to be equally applicable to I.C.C. imposed labor conditions.

The Tenth Circuit has ruled that all matters necessary to render a decision is included in the authority of an arbitrator and that any doubts as to whether an issue is proper must be resolved in favor of arbitrability. *Ormsbee Development Co. v. Grace*, 688 F.2d 1040 (10th Cir. 1982), *cert. denied*, 459 U.S. 838, 103 S.Ct. 84, 74 L.Ed.2d 79 (1982).

The I.C.C. has contended that the Cassle panel award did not draw its essence from the labor conditions imposed. However, the panel clearly answered the question that had been defined by the U.S. District Court. The panel clarified any confusion that existed in its *NUNC PRO TUNC* order when it found a "transaction", a direct causal relationship between that "transaction" and the acquisition of the BA&P by ARCO and entitlement to benefits. (Appendix H at 88a).

The I.C.C. also found that the arbitrator had exceeded his jurisdiction. However, this ruling was in reality an

attack on his reasoning. In *Armstrong Lodge, supra*, the court held this cannot serve as a basis for vacating an award. The proper function of a reviewing body is not to set aside an award even if a different result might have been reached by that body. (783 F.2d at 134-35).

The foregoing demonstrates that the I.C.C. did not confine its review to the *Steelworkers Trilogy* standards and, actually, the I.C.C. violated those standards because it does not possess the power under 49 U.S.C. § 11351 to substitute its findings of fact or determinations of causation for those of arbitrators sitting under I.C.C. imposed labor protective conditions.

This Court should grant the writ requested herein to provide the necessary direction to the I.C.C. and to require the I.C.C. to confine its "review power" to the standards of review that are applicable to federal courts conducting review of arbitration awards.

III. THIS CASE PRESENTS IMPORTANT QUESTIONS THAT MUST BE SETTLED BY THIS COURT IN VIEW OF THE INCONSISTENT RULINGS OF THE VARIOUS CIRCUIT COURTS OF APPEAL

The Ninth Circuit Court of Appeals affirmed the orders of the I.C.C. that vacated the Cassle panel award. The opinion indicated that the actions of the I.C.C. were proper. The implication is created that 49 U.S.C. § 11351 allows the I.C.C. to issue supplemental orders even if they result in vacation of arbitration awards by allowing the I.C.C. to substitute its findings of fact and determinations of causation for those of the arbitrator.

In *Brotherhood of Locomotive Engineers v. I.C.C.*, 885 F.2d 446 (8th Cir. 1989) the Court held that the I.C.C. does not have the jurisdiction to determine the factual issue of causation because that power rests solely with the arbitrator. The Eighth Circuit specifically held that it was error for the I.C.C. to substitute its judgment on factual finding for those reserved to arbitrators citing the *Steelworkers Trilogy* (885 F.2d at 450-51).

These two opinions are directly in conflict on an important issue to arbitrators sitting nationwide on cases arising under I.C.C. imposed labor protective conditions. To resolve this confusing area and to provide some guidance to the I.C.C. and arbitration panels alike, the writ requested in this case should be granted.

CONCLUSION

This Court should grant the writ requested in this case to bring the important issue of the scope of review of arbitration decisions by the I.C.C. as well as the jurisdiction of the I.C.C. to substitute its findings of fact and determination of causation for those of an arbitrator, before this Court for review.

Respectfully submitted,

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Date: December 19, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-7138, 88-7162 and 89-70504

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, represented by BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF AIRLINE CLERKS and BROTHERHOOD OF RAILWAY CARMEN,
Petitioner,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION,
Respondents,

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY (BA & P),
Respondent-Intervenor.

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, represented by UNITED TRANSPORTATION UNION,
Petitioner,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION,
Respondents.

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, represented by BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF AIRLINE CLERKS, BROTHERHOOD OF RAILWAY CARMEN, and UNITED TRANSPORTATION UNION,
Petitioner,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION,
Respondents.

Petition to Review a Decision of the
Interstate Commerce Commission

Argued and Submitted Jan. 8, 1991

Decided July 10, 1991

David M. McLean, Knight, Dahood, McLean & Everett, Anaconda, Mont., for petitioner.

Steven L. Zelinger, U.S. Dept. of Justice, and Dennis Starks, I.C.C., Washington, D.C., for respondents.

Robert J. Corber, Steptoe & Johnson, Washington, D.C. and Donald C. Robinson, Poore, Roth & Robinson, Butte, Mont., for respondent-intervenor.

Before BROWNING, CANBY and TROTT, Circuit Judges.

CANBY, Circuit Judge:

In this consolidated proceeding, various labor organizations (the Unions) petition for review of three orders of the Interstate Commerce Commission (ICC). In these orders, the ICC denied labor protective benefits to employees represented by the Unions. On appeal, the Unions argue that the ICC acted arbitrarily and capriciously or exceeded its jurisdiction in vacating an arbitration decision awarding benefits to the employees. The Unions also contend that the ICC should have reversed a second arbitration decision denying benefits. We affirm the orders of the ICC.

BACKGROUND

When the Atlantic Richfield Company (ARCO) acquired the copper mine operations of the Anaconda Company of Delaware (Anaconda), Anaconda owned two

railroads, the Butte, Anaconda & Pacific Railway Company (BA & P) in Montana and the Tooele Valley Railroad Company (TOV) in Utah. Because two railroads were involved, ARCO was required to obtain ICC approval of the merger pursuant to 49 U.S.C. § 11343 (1988), even though the two railroads were separate entities and no consolidation, coordination, or interchange was physically possible due to location. The ICC approved the acquisition, conditioned on ARCO's acceptance of labor protective conditions (ultimately, the so-called *New York Dock* conditions). The ICC is required to impose labor protective conditions in authorizing rail mergers and consolidations. 49 U.S.C. § 11347 (1988). The *New York Dock* conditions require arbitration of disputes regarding the application, interpretation and enforcement of the benefits conferred by the conditions.

In late 1979, the copper market collapsed. As a result, ARCO closed the copper smelter facilities located in Anaconda, Montana, which were the principal source of materials shipped on the BA & P. An additional reduction in mining and processing operations in Butte and Anaconda in 1981 further diminished the shipping volume on the BA & P and decreased employment on the railroad. As a result of these reductions, the United Transportation Union (UTU), and later, BA & P employees represented by other labor organizations, asserted that BA & P employees who were adversely affected by the job changes were entitled to *New York Dock* benefits.

In 1982, the UTU on behalf of its members requested the National Mediation Board to appoint a neutral member of an arbitration board as provided by the *New York Dock* conditions. The Board appointed Jack Cassle as the neutral of a three-member arbitration panel (the Cassle panel). After a failed attempt by BA & P to enjoin the arbitration, the matter was arbitrated.

The Cassle panel divided the arbitration into liability and damage phases. After hearings, Arbitrator Cassle

issued an order dated September 26, 1984, in which he found BA & P liable for *New York Dock* benefits to employees adversely affected by reductions-in-force and job changes that occurred between February 15, 1978 and February 14, 1982. In the liability order, Cassle noted that the only "effects to the employees of the BA & P after the acquisition would be those that might result from *economic* considerations."

BA & P's liability was based on Cassle's finding that ARCO, Anaconda, and BA & P entered into a pre-transaction agreement with BA & P employees to accord protection for post-transaction job changes. Cassle imputed a contract from statements made by ARCO and Anaconda in the control application to the ICC and announcements to BA & P employees that employees would not be adversely affected by the transaction. He further determined that an express contract was formed between the applicants and the ICC when the ICC approved the application and the statements contained therein. On the strength of his determination that ARCO and the BA & P voluntarily provided for employee protection, Cassle rejected as irrelevant BA & P's arguments that employees were adversely affected by economic conditions that arose subsequent to the acquisition. Instead, Cassle determined that applicants knew the industry and could have foreseen the possible decline in the copper market when they represented that the transaction would have no adverse effect on employees.

On December 11, 1984, BA & P petitioned the ICC to reopen and clarify the conditions it imposed on the transaction.[1] In response to BA & P's actions, Arbitrator Cassle issued a *Nunc Pro Tunc* order signed on February 6, 1985, to clarify his liability determination. Cassle explained that ARCO's application to the ICC to acquire

[1] BA & P also filed suit in district court to review Cassle's liability determination. The district court stayed the proceedings pending a final award from the Cassle panel.

control of the railroads and representations by ARCO and Anaconda to BA & P employees regarding employee protection benefits constituted an offer to accord the labor protective conditions to any employee who became adversely affected during the term of the conditions "regardless of cause." According to Cassle, the ICC accepted the offer when it approved the transaction and imposed the employee protective conditions. Cassle concluded that the ICC's order was a "transaction" within the definition of 49 U.S.C. § 5(2) and that a direct causal connection existed between the transaction and the job changes.

The Cassle panel resolved phase II of the arbitration on March 15 and May 15, 1986. The award became effective on May 22, 1986. The UTU then filed suit before the district court in Montana to enforce the award. The district court consolidated UTU's petition with BA & P's earlier petition to review the Cassle panel's phase I determination. Proceedings continued in the district court until the ICC rendered the decisions now on appeal before this court.

In the summer of 1985, a second arbitration panel was formed to hear the claims for protective benefits filed by BA & P employees represented by the Brotherhood of Maintenance of Way Employees, the Brotherhood of Railway, Airline & Steamship Clerks an the Brotherhood of Railway Carmen. Joseph Sickles served as a panel of one (the Sickles arbitration).

At the arbitration, the Unions asserted that Arbitrator Sickles was bound by the Cassle panel's earlier determination that BA & P was liable for *New York Dock* benefits. Sickles rejected this suggestion, and on February 2, 1988, concluded that the adverse effects to BA & P employees were not caused by ARCO's acquisition of control of the railroad, but resulted from Anaconda's changes in operation. Sickles therefore denied the Unions' claims for benefits.

The Unions petitioned the ICC for review of the Sickles' decision and brought an action in United States district court to enjoin, annul, set aside, suspend or judicially review an order of the ICC. In addition, they petitioned this court for review of the Sickles' decision.

Two weeks after the Sickles' decision was served, the ICC granted BA & P's three-year-old request to reopen and clarify the labor protective conditions imposed by the ICC when ARCO acquired Anaconda. Because BA & P's petition emanated from the Cassle award, the ICC decided to review the award itself. The ICC determined that it had authority to review the award under 49 U.S.C. § 11351 (1988), which empowers the ICC to issue supplemental orders in proceedings in which it has previously exercised its authority. The ICC also noted that its earlier decision in *Chicago & North Western Transp. Co.*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*), authorized review of arbitration decisions applying ICC-imposed conditions. The ICC confirmed that it would review the award under the standards set forth in *Lace Curtain*. *Lace Curtain* adopted the deferential criteria set forth in the so-called *Steelworkers Trilogy*.[2] Under these standards, awards are not vacated because of a substantive mistake unless there is "egregious error, the award fails to draw its essence from the collective bargaining agreement; or the arbitrator exceeds the specific contract limits on his authority."

The ICC concluded that review of Arbitrator Cassle's decision was warranted because Cassle had misinterpreted the scope of labor protection imposed in the control proceeding. According to the ICC, Cassle incorrectly found that the ICC had approved an agreement requiring ARCO

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[2] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

to pay benefits to adversely affected employees regardless of cause. The ICC concluded that Cassle's finding "failed to draw its essence from the conditions imposed by this agency" as well as having "exceeded the limits of his authority as defined by the *New York Dock* conditions."

The Commission also found that Cassle had erred in his handling of the issue of "causal nexus." Although noting that it normally would not review issues of causation, the ICC decided to "reevaluate" the issue because Cassle's "determination of causation issues was based on the flawed premise that the Commission intended *New York Dock* benefits imposed in the control transaction to cover any and all future adverse effects on BA & P employees." Thereafter, the ICC found that Anaconda's post-1979 changes were made as a result of changing market conditions in the copper industry and that the market conditions caused the adverse effects on the BA & P railroad and its employees. Consequently, the ICC vacated the Cassle award in a supplemental order issued March 2, 1988.

The UTU petitioned the ICC to reopen, reconsider and clarify its supplemental order. The ICC consolidated UTU's petition to reconsider with the Unions' petition to review the Sickles' award and denied both petitions in a decision served September 21, 1989. In regard to the Cassle arbitration, the ICC rejected UTU's argument that the ICC exceeded its proper scope of review in reversing the Cassle decision. The ICC reasoned that it was permitted to vacate arbitration awards for egregious error. In regard to the Sickles' decision, the ICC ruled that Sickles had correctly stated and applied the burden of proof embodied in its *New York Dock* conditions. Because it found no error in Sickles' findings on causation, the ICC denied the petition.

The Unions then petitioned this court for review of the September 21, 1989 order. The Unions' petition was consolidated with UTU's earlier petition for review of the

ICC order dated March 2, 1988 and the Organizations' petition for review of the Sickles' arbitration decision. We hereinafter refer to all of the appellants as the Unions.

ANALYSIS

The orders challenged by the Unions are the Sickles arbitration award served February 2, 1988; the ICC supplemental order served March 2, 1988, reversing the Cassle arbitration award; and the ICC decision served September 21, 1989, denying a petition to reopen, reconsider and clarify the decision served March 2, 1988, and denying a petition to review the Sickles arbitration award. On appeal, the Unions argue that: (1) the ICC acted arbitrarily or capriciously or exceeded its authority and jurisdiction in reviewing the Cassle award, and (2) the Sickles' award and the ICC's refusal to review that award are arbitrary and capricious because they confer upon Arbitrator Sickles review powers in excess of those possessed by the courts or the ICC. We address each argument in turn.

A. Standard of Review

We will overturn a decision of the ICC only if its findings or conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A), (C), (E) (1988); *Gray Lines Tour, Co. of Southern Nevada v. ICC*, 824 F.2d 811, 813 (9th Cir.1987).

B. ICC Review of the Cassle Arbitration

The Unions assert that the ICC acted arbitrarily or capriciously in its review of the Casle arbitration because it exceeded the permissible limits of review set forth in *Lace Curtain*, 3 I.C.C.2d 729 (1987). Although the Unions do not challenge the ICC's authority to review

arbitration decisions, this circuit has not yet addressed the issue. Accordingly, we first determine whether the ICC properly may review arbitration decisions resolving disputes over the interpretation, application or enforcement of labor protective conditions imposed by the ICC. We conclude that it may.

Prior to 1987, the ICC excluded itself from the arbitration process, deferring to the expertise of the arbitrators in resolving the matters submitted to them for resolution. *See, e.g., Haskell H. Bell v. Western Maryland Railway Co.*, 366 I.C.C. 64 (1981). In 1987, however, the ICC announced that it would review arbitral decisions issued under employee protective conditions originally imposed by the Commission. *Chicago & North Western Transportation Co.*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*). The ICC noted that the Civil Aeronautics Board exercised the power to review arbitrations applying its labor protective conditions even though no statute authorized such review. *See Wallace v. CAB*, 755 F.2d 861 (11th Cir.1985). Because the *Steelworkers Trilogy* and other cases generally limited the scope of review of arbitration decisions, the ICC determined that it would limit its review to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." *Id.* at 736. The ICC further stated that it would not review arbitrators' decisions on the issue of causation, the calculation of benefits, or other factual questions.

The Commission's decision to review arbitration awards relating to its protective conditions is consistent with the ICC's statutory powers. As the ICC points out, an arbitration award issued pursuant to labor protective conditions prescribed by the Commission is an "order" of the ICC. *United Transp. Union v. Norfolk & Western Ry. Co.*, 822 F.2d 1114, 1120 (D.C.Cir. 1987), *cert. denied*, 484 U.S. 1006, 108 S.Ct. 700, 98 L.Ed.2d 651 (1988). The Commission has the power to change its orders if it gives a reasoned explanation of the change. *Central*

States Enterprises, Inc. v. ICC, 780 F.2d 664, 674 (7th Cir.1985). In addition, the ICC may issue supplemental orders upon a showing of "cause." 49 U.S.C. § 11351 (1990); *People of State of Illinois v. ICC*, 713 F.2d 305, 310 (7th Cir.1983).

The District of Columbia Circuit has upheld the Commission's authority to review arbitration awards. In *International Broth. of Elec. Workers v. ICC*, 862 F.2d 330 (D.C.Cir.1988), the court held that the ICC's determination that it had statutory authority to review arbitration awards was a permissible construction of its governing statute, the Interstate Commerce Act (ICA), 49 U.S.C. § 10101 (1988) *et seq.* The court reasoned that the ICA is silent on the issue, and the ICC's decision to review is consistent with the terms of the statute, the relevant case law, and the ICC's own decisions. *Id.* at 338. We agree with the court's reasoning and adopt its rule.

In the present case, the ICC reviewed the Cassle award pursuant to its authority to issue supplemental orders. The ICC explained that Cassle had misinterpreted the labor protective conditions and exceeded the scope of his authority. Because the ICC adequately explained its decision to review, and cited good cause to issue a supplemental order, we conclude that the ICC could permissibly review the Cassle award. The fact that the ICC decided to review the Cassle award on its own initiative (BA & P did not specifically request the ICC to review the award) does not trouble us. Pursuant to 49 U.S.C. § 10327(g)(1) (1988), the Commission may "at any time on its own initiative" reopen a proceeding because of material error. Accordingly, we proceed to the merits of the Unions' argument.

The Unions challenge the ICC's initial basis for reviewing the Cassle award—its determination that Arbitrator Cassle exceeded his jurisdiction. The Unions assert that Arbitrator Cassle did not exceed his jurisdiction; the

arbitration panel was directed to decide whether the control transaction adversely affected BA & P employees and the panel answered in the affirmative. The Unions contend that the Cassle award is comprised of many documents and orders which must be reviewed as a whole. According to the Unions, the ICC improperly analyzed the rationale of the Cassle award, placing too much emphasis on Cassle's statement in the *Nunc Pro Tunc* order that BA & P employees were entitled to *New York Dock* benefits "regardless of cause." Cassle's ruling in the *Nunc Pro Tunc* order, the Unions assert, was based on alternative theories. Although Cassle determined that BA & P might might be liable for benefits on the basis of the implied contract, he also found that BA & P employees were adversely affected by the control transaction.

In support, the Unions point to Cassle's February 3, 1984 order in which Cassle stated that there was a direct causal relationship, and the September 26, 1984 order indicating that Cassle was concerned about the establishment of a causal nexus. The Unions contend that if the Cassle panel was in fact attempting to award benefits to all employees regardless of cause, every claim that had been submitted by BA & P employees would have been honored. According to the Unions, Arbitrator Cassle rejected 30 of the 63 claims submitted to him because he concluded there was not a direct causal relationship in those cases.

We are not persuaded by the Unions' arguments. First, our review of the record shows that none of the thirty claims were dismissed for failure to show a causal connection. The reasons for the rejections were stated by Arbitrator Cassle in his ruling dated March 23, 1986 and May 15, 1986, and included retirement of the claimant, failure of the claimant to protect seniority or to return to work pursuant to recall, or absence of jurisdiction in the panel to hear the particular employee's claim. One claim was denied without explanation.

Second, after examining the Cassle award, we conclude that the ICC did not err in its conclusion that Arbitrator Cassle exceeded the scope of his jurisdiction. Arbitrator Cassle clearly did not confine himself to the bounds of his authority. Instead, he fashioned an agreement that simply did not exist. The ICC rejected Cassle's finding that the Commission had approved or adopted such an agreement. As the ICC noted, such an agreement is contrary to the purpose of the *New York Dock* conditions, which is to protect employees from adverse effects *of the transaction* approved by the ICC. Because the Cassle panel exceeded the scope of its jurisdiction, the ICC's decision to vacate that award was neither arbitrary, nor capricious, nor in excess of its jurisdiction.

The Unions next argue that even if the ICC permissibly reviewed and vacated the Cassle award, the Commission exceeded the scope of its jurisdiction by modifying Arbitrator Cassle's factual findings on the issue of causation. The Organizations point to the following language in the ICC decision:

> In *CNW*, *supra*, 3 I.C.C.2d at 736, we stated that we will not review factual issues of causation. These issues are best left to the arbitrator. Here, however, the Neutral's determination of causation issues was based on the flawed premise. . . . His conclusions, particularly on post-transaction job changes, are thus faulty and the facts need to be reevaluated.

According to the Organizations, the ICC should have remanded the case to the Cassle panel for reconsideration of its findings on causation.

Because we conclude that the ICC did not substitute its findings of fact for those of the Cassle panel, we need not determine whether the ICC may exceed the permissible scope of review that it established for itself in *Lace Curtain*. *See Wallace v. Civil Aeronautics Bd.*, 755 F.2d 861, 864-65 (11th Cir.1985) (upholding the Civil Aeronautics

Board's (CAB) scrutinizing review of an arbitral decision and reapplication of the arbitrator's findings of facts despite the CAB's earlier proclamation of its limited review powers). The ICC's determination that the adverse effects suffered by BA & P employees were caused by changing market conditions does not differ significantly from Arbitrator Cassle's earlier conclusion that the "only effects to the employees of the BA & P after the acquisition would be those that might result from *economic* conditions." (Emphasis in the original.) The ICC merely reiterated Arbitrator Cassle's earlier findings.

Finally, the Unions argue that the ICC's findings of fact and conclusions of law are arbitrary and capricious because they ignore the evidence in the record. We disagree. As noted above, the ICC's findings were virtually identical to those initially made by Arbitrator Cassle, and they are supported by the record.

1. The Sickles' Award

The Unions challenge the Sickles arbitration decision served February 2, 1988 and the ICC's September 12, 1989 order. The Unions argue that Arbitrator Sickles should have been bound by the res judicata effect of the earlier Cassle award. The Unions contend that, by refusing to review the Sickles award, the ICC conferred upon Arbitrator Sickles a greater power to nullify an award than that possessed by the courts and the ICC.

Because we have concluded that the ICC properly reviewed and vacated the Cassle award, this issue is moot. The reversed Cassle decision cannot provide a basis for issue preclusion.[3]

Accordingly, the orders of the ICC are AFFIRMED.

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[3] Although appellants argue that issue preclusion applies to unreviewed arbitrations, they do not cite any case in support. We have not located any case which holds that an arbitrator * * *

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28490 (Sub-No. 1)[1]

ATLANTIC RICHFIELD COMPANY and ANACONDA COMPANY —CONTROL—BUTTE, ANACONDA AND PACIFIC RAILWAY COMPANY and TOOELE VALLEY RAILROAD COMPANY

ARBITRATION REVIEW

Decided September 12, 1989

In Finance Docket No. 28490 (Sub-No. 1), petition to reopen, reconsider and clarify prior Commission decision served March 2, 1988, that reviewed award of Arbitration Jack W. Cassle denied.

In Finance Docket No. 28490 (Sub-No. 2), petition to review award of Arbitrator Joseph A. Sickles denied.

BY THE COMMISSION:

BACKGROUND

We are considering here two arbitral awards resolving claims for benefits under employee protective conditions imposed in a decision in Finance Docket No. 28490, Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda and Pacific Railway Company

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[1] This decision embraces Finance Docket No. 28490 (Sub-No. 2), *Atlantic Richfield Company and Anaconda Company—Control—Butte, Anaconda and Pacific Railway Company and Tooele Valley Railroad Company.*

and Tooele Valley Railroad Company (not printed), served January 17, 1978.[2] In that decision, we granted authority to Atlantic Richfield Company (ARCO) and its wholly owned subsidiary, Anaconda Company of Delaware (Anaconda), to acquire control of Butte, Anaconda and Pacific Railroad Company (BAP) and Tooele Valley Railroad Company (TOV).

BAP and TOV were wholly owned subsidiaries of Anaconda Company of Montana (Anaconda-Mont.), a Montana corporation. In January 1977, ARCO acquired Anaconda-Mont. and its wholly owned subsidiaries, BAP and TOV. Anaconda-Mont. was then merged into Anaconda, a newly formed Delaware corporation and wholly-owned subsidiary of ARCO.

BAP operated a 25-mile line between Butte and the city of Anaconda, MT. Its principal function was carrying copper concentrates and related materials for Anaconda-Mont. from its mines in Butte to its smelting and drying facilities in the city of Anaconda. Approximately 97% of BAP's traffic was generated by its parent. TOC operated a seven-mile line between the lead smelter of Internation Smeling and Refining Company at International, UT, and Warner, UT.

ARCO and Anaconda stated, and we noted in the January 17, 1978 decision, that they contemplated no change in BAP's or TOV's operations and expected no adverse effects on employees resulting from the transaction. However, as required by statute, the *New York Dock* conditions were imposed to protect the interests of employees that might be affected by acquisition of control of BAP and TOV by ARCO and Anaconda.[3]

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[2] Since both awards involve the same 1978 decision, we have consolidated these two cases for decision.

[3] The January 17, 1978 decision subjected the control transaction to the conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 71 (1977). Subsequently, we reopened Finance

The acquisition of control by ARCO and Anaconda, had no immediate effect on BAP's organization and operation. With minor exceptions not related to the change in control, BAP officers and employees retained the same jobs they had before the acquisition, no operating changes were made, and equipment use remained the same. Day-to-day labor relations and personnel decision remained in the hands of the same railroad management that existed before the control transaction.

In late 1979, copper prices dropped. BAP noted that the decline in the copper market adversely affected Anaconda's operations and caused sharp reductions in traffic moved on the line. In 1980, Anaconda closed the principal source of BAP's traffic—its smelter in the city of Anaconda. In 1981, Anaconda closed its refining facilities in Great Falls, MT, and curtailed mining in Butte and processing in the city of Anaconda. In 1981, Anaconda built a new copper concentrate drying facility in Butte, and thus no longer had to move copper concentrate to the city of Anaconda. Some rail traffic was diverted to trucks after a fire at a tipple. The TOV line was abandoned in 1981. No. AB-221, *Tooele Valley Ry. Co.—Abandonment—Between Warner and International, UT* (not printed), served November 12, 1981.

BAP claimed that traffic losses resulting from these changes in Anaconda's operations caused it to reduce its work forces in 1982. BAP asserted that it experienced a drop of nearly 98% in revenue freight ton-miles between 1979 and 1983, incurring operating losses that required it to eliminate jobs to cut costs.

In Finance Docket No. 28490 (Sub-No. 1), we reviewed a decision by Arbitrator Jack W. Cassle, who found that BAP was liable to *New York Dock* benefits to its employ-

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Docket No. 28490 and substituted the conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (*New York Dock*).

ees who were represented by the United Transportation Union (UTU) and adversely affected between February 1978 and February 1982. In a decision served March 2, 1988 (the "March 2 Decision"), we found that Arbitrator Cassle had erred. We ruled that there was insufficient causal connection between the control transaction we approved and the adverse effects on the employees to make them eligible for *New York Dock* benefits. UTU seeks reconsideration of our March 2 Decision.

In Finance Docket No. 28490 (Sub-No. 2), we are now for the first time asked to review an arbitral award by Arbitrator Joseph A. Sickles, issued on February 1, 1988.[4] The award denied claims for *New York Dock* benefits filed by the Brotherhood of Maintenance of Way Employees' Union, Brotherhood of Railway Airline and Steamship Clerks, and Brotherhood of Railroad Carmen (the Organizations). These claims were based on grounds nearly identical to the UTU claims raised in proceedings before Arbitrator Cassle and reviewed in the March 2 Decision. In contrast with Arbitrator Cassle, however, Arbitrator Sickles found the employee's position was not caused by ARCO's acquisition of control approved by us in 1978 and denied *New York Dock* benefits.

DISCUSSION AND CONCLUSIONS

I. CASSLE AWARD

A. Procedural Issues

1. UTU contends that we lacked jurisdiction to review the Cassle Award because BAP failed to seek administrative review within 20 days of the date of the award as

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[4] In a letter dated April 26, 1988, arbitrator Sickles rejected the Organizations' request that he reopen and reconsider his award. The Organizations are also seeking judicial review of the award in *Employees of Butte, Anaconda & Pac. Ry. ICC*, No. 88-7138 (9th Cir. filed April 1,1988); and *Brotherhood of Maintenance-of-Way Employees v. Butte, Anaconda & Pac. Ry.*, No. CV-88-25-BU (D. Mont. filed May 2, 1988).

required by 49 U.S.C. § 10327(e), and as such the award became the final decision of the Commission by operation of law. We disagree. Section 10327(e) applies only to initial decision rendered by a division, an individual Commissioner, an employee Board, or an administrative law judge appointed in accordance with 5 U.S.C. § 3105.

In *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 5 I.C.C.2d 234 (1989) at 237, we addressed the question of timely appeals from arbitration awards. We decided to apply the 20-day statutory period exclusively to future cases. We did not apply this limitation in the case before us as the parties had no notice. The same conclusion applies here and we decline to deny review on grounds that BAP failed to file its petition for review immediately after issuance of the award. Indeed, BAP filed the petition before our decision in *Chicago and North Western Tptn. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*), *aff'd sub. nom. International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988), in which we first detailed our view of our authority to review arbitration decisions.[5]

2. UTU also contends that we had no authority to review the arbitrator's decision, since we did not decide the petition within the 120-day deadline of § 10327(g)(2). While we may informally apply a 120-day deadline to many cases as a discretionary matter so as to expedite our decisions, the language of § 10327(g)(2) does not control the timing of review of arbitration decisions. Section 10327(g)(2), by its terms, only governs actions taken by a Division of the Commission, which is defined in the statute as consisting of at least three Commissioners. *See* 49 U.S.C. § 10302. An arbitrator's decision is not a Division decision. *Accord Central States Enterprises v. ICC*, 780

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[5] We also agree with BAP that under the terms of the statute decisions of arbitrators do not qualify as initial decisions of this Commission.

F.2d 664, 671 n. (7th Cir. 1985).[6] Accordingly, we reject UTU's contentions.

3. UTU notes that BAP has not sought administrative review of the arbitrator's award (it had sought reopening of the control proceeding for clarification of the conditions) and argues that we may not grant relief that had not been requested. UTU's argument is erroneous. As we noted in the prior decision, BAP's petition was filed prior to the issuance of *Lace Curtain*. There, we concluded that we had jurisdiction to review decisions issued under the arbitration provisions of the labor protective conditions we have imposed under § 11347. We found that our jurisdiction resided in the statutory mandate to impose the conditions. *Id.* at 733. In light of that decision, we determined that review of Arbitrator Cassle's award was warranted to correct his erroneous interpretation of the conditions imposed in the control transaction. While the specific action taken was not sought by the parties, it was an appropriate exercise of our authority, including the mandate of § 11347 to impose employee protection and our authority under § 11351 to issue supplemental orders. In any event, we have broad authority to conduct proceedings and investigate matters as we find appropriate. *See, e.g.*, 49 U.S.C. § 10321. Ample authority also existed for review on our own motion under § 10327(g)(1), as well as under our inherent power to interpret the labor protective conditions we have imposed.

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[6] Assuming *arguendo*, the 120-day time limit of § 10327(g)(2) applies, there is no sanction or penalty such as loss of jurisdiction for failure to meet this deadline. *See Aluminum Co. of American v. ICC*, 761 F.2d 746, 748 (D.C. Cir. 1985), where the court, speaking of a similar provision, stated:

> the remedy for the Commission's failure to comply with the statutory deadline is the remedy which petitioners sought and obtained in the District Court, an order directing the Commission to act—not the senseless remedy of cutting off the rights of a totally innocent appellant.

See also Central States, supra, 780 F.2d at 672 n.8.

B. *Scope of Review*

UTU next avers that the standard of review we established in *Lace Curtain* was not followed in reviewing the Cassle Award. UTU contends that in *Lace Curtain* we adopted the standard announced in the so-called *Steelworkers Trilogy*,[7] under which, UTU argues, we must limit our scrutiny of the arbitral award to determining whether the award was procedurally fair and impartial.

As we pointed out in the March 2 Decision (at 6), the *Steelworkers Trilogy* standard of review has been interpreted by subsequent courts to permit or require courts to vacate arbitration awards for substantive mistakes when "there is egregious error; the award fails to draw its essence from the collective bargaining agreement; or the arbitrator exceeds the specific contract limits on his authority," citing *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1275-76 (11th Cir. 1982). The March 2 Decisions went on to find (at 6-7) that the Cassle Award with its erroneous interpretation of the *New York Dock* conditions as covering any employees "affected by post-transaction job changes, regardless of cause," must be vacated under the *Steelworkers Trilogy* standards, referring specifically to the tests described above:

> Under any of the tests noted above [T]he Neutral's [Cassle's] finding failed to draw its essence from the conditions imposed by the agency. The Neutral also exceeded the limits of his authority as defined by the *New York Dock* conditions.

While the Commission did not specifically find "egregious" error, the March 2 Decision described the principal Cassle finding as "unsupported by any evidence in the record" (at 8), "reached by inferences based upon * * * false

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[7] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593 (1960).

assumptions" (*id.*) and erroneous." *Id.* We applied the appropriate standard of review of the Cassle Award in our March 2 Decision.

C. *Other Issues*

UTU raises several other specific objections to our March 2 Decision on the Cassle Award:

1. In its petition (at 11), UTU disputes our statement that no employees were adversely affected following the acquisition of control until the decline in the copper market in late 1979. Specifically, it charges that we did not consider the diversion of limerock from BAP to trucks in late 1978 and the changes in 1979 at Coal Pile No. 1, where Anaconda employees replaced BAP employees. In fact, we did consider these events and they are described on at 9 of our decision.

As we noted in the March 2 Decision (at 8), before an employee is entitled to *New York Dock* benefits there must be a reasonably direct causal connection between the transaction and injury sustained; in other words, the transaction must be the proximate cause of the injury. The uncontroverted facts of record, however, show that the diversion of limerock to trucks was due to a fire in November 1978 that destroyed a rail tipple. As for the switching change at Coal Pile No. 1, the uncontradicted testimony of record is that the track is owned by Anaconda, and *its* employees have claimed the right to perform these switching operations since 1923. Thus, these two events occurred either as a result of external forces, or as a result of an arrangement that pre-dated our approval of the control application.

2. UTU filed a Supplement to its Petition on December 14, 1988, challenging our description of the decline of the copper market in the March 2 Decision. UTU submitted an affidavit from Gene W. Miller, UTU Vice Chairman, to counter BAP's assertion that copper markets declined in

1979. Mr. Miller produced data from the Cassle arbitration proceeding listing copper prices and costs for the years 1976 through 1983. According to the data, copper prices reached an all-time high in 1980. It believes this evidence warrants reconsideration of the March 2 Decision finding that employees were adversely affected by declining copper prices.

We can not accept UTU's assessment of this evidence, and will not reverse our earlier findings. The supplemental data submitted by UTU were originally presented at the arbitration proceeding by BAP's witness who testified that the data did not reflect inflation. The witness for BAP demonstrated that when inflation is considered, prices were actually 30 cents less per pound than necessary to stay even with inflation for the period involved. It was also shown that copper production for 1977 and 1980 was reduced substantially by strikes. And while there was evidence before the arbitrator showing that copper prices staged a short-term recovery in late 1979 and 1980, there was uncontroverted testimony that copper prices as a whole were still below a sufficient level to stay even with inflation. Indeed one report showed a two-year decline in the average price of import-export copper ores and concentrates.

3. UTU's also contends (Petition at 4-6) that in our March 2 Decision we placed unfounded reliance on representations by BAP in its petition and did not conduct an independent review of the arbitration record. Specifically, UTU takes issue with various factual statements in the March 2 Decision.[8]

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[8] UTU asserts that our statement that "All BAP officers and employees retained the same jobs as they had before the acquisition" is inconsistent with the record in the arbitration proceeding revealing that BAP employees did not retain the same jobs. Petition at 5. It also challenges our statement that "no operating changes were made and equipment use remained the same." *Id.* UTU contends that the arbitrator examined numerous operating changes in his

We have reviewed both the arguments of UTU and BAP. We have also re-examined the record and we see no reason to reverse our March 2 Decision. We relied on the December 5, 1984, verified statement filed by BAP's President, John W. Greene. That evidence was never contradicted before us and testimony in the arbitration proceeding supported it (Tr. 5-6, 24-28, 30-31), so we were entitled to rely upon it. In any event, UTU's assertions do not directly contradict the challenged statements and are easily reconcilable with them. It is clear from the context of Mr. Greene's statement that BAP's personnel were not disrupted, and that he was referring to the period immediately following the change in control of BAP, while UTU is referring to a much later period. Also, there does not appear to be any conflict between Mr. Greene's (and our) statement that "day-to-day" matters remained in the hands of BAP officials and UTU's contention that BAP had to submit budget and finance matters to ARCO for approval. Finally, the minor 1979 changes caused by a tipple fire (referred to at 3, March 2 Decision) and the Anaconda employees' assertion of their switching rights (Petition at 12) were not the result of any internal business decisions of ARCO or Anaconda and are not relevant to the issue before us. Accordingly, we reject UTU's assertion that our March 2 Decision relied upduly on BAP's representations.

Nunc Pro Tunc Order. UTU contends (Petition at 7) that we did not recognize the significance of the *nunc pro tunc* order that Arbitrator Cassle issued to clarify his September 26, 1984, decision. If we understand UTU correctly, it asserts that we did not consider a "second

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factual determination. UTU also disputes our statement that "day-to-day labor relations and pesronnel decisions continued in the hands of the same railroad management as before the control transaction." Petition at 6. It points out that evidence was introduced in the arbitration proceeding that BAP had to submit all budget and finance matters for ARCO's approval and confirmation.

alternative basis" for the arbitrator's decision, specifically that he found "a direct causal connection" between our 1978 approval of control of BAP and the complained-of job changes. Order, at 2.

We did not ignore this argument. On the contrary, a significant part of our discussion in the March 2 Decision (at 8-10) relates to the proper interpretation of causal relationships in the context of applying our labor protective conditions. We specifically found that the arbitrator erred in his causal analysis (at 10).

Implementing agreement. The UTU points to the statement in our March 2 Decision that no implementing agreement was negotiated between BAP and employee representatives, and contends that we attached a great deal of importance to that fact. Petition at 10. UTU charges that failure to negotiate an agreement was due to BAP's violation of the *New York Dock* conditions and that this violation was due to BAP's failure to notify employees of the proposed transaction. UTU further alleges that BAP and ARCO did not approach employee representatives and indicate how they would accord protection to employees.

UTU misconstrues our statement regarding the absence of an implementing agreement. Contrary to UTU's assertion, that statement was not "emphasized" but was noted as a matter of fact in connection with our discussion that labor protective conditions may be negotiated but the level of protection negotiated may not be less than the minimum level imposed by our *NY Dock* conditions, whereas here, in the absence of a negotiated protective agreement, *NY Dock* conditions will govern.

Moreover, the presence or absence of an implementing agreement is not dispositive of whether a causal link exists between the approved transaction and the argued adverse impact on employees sufficient to bring employees with the scope of conditions imposed by the Commission.

Causation, we have said, is primarily a matter of evidentiary fact. To the extent that UTU suggests that statement demonstrates our reasoning was shallow, it is wrong. To the extent the UTU attempts to cast a procedural argument on the issue of *notice*, it misses the mark on the issue of causation and coverage.[9]

Due Process. Lastly, UTU argues (Petition at 29) that it was denied due process by not being permitted to intervene in the proceeding until the March 2 Decision and by our delay in deciding the case.[10] It states that, because we did not grant its petition at an earlier date, it could not adequately present its arguments and case to the Commission on the merits.

We reject this contention. UTU had ample opportunity to participate fully as a party even before it filed its petition. BAP served UTU's counsel with a copy of its original petition in December 1984. UTU did not petition for leave to intervene in this proceeding until April 16, 1987. UTU participated in the arbitration proceeding and the court actions.[11] On December 22, 1986, UTU filed

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[9] Although separate and distinct obligations, notice under § 4 procedures of *NY Dock* conditions may be generally paired with evidence of *actual* notice of transaction and regulatory approval proceedings, and the well recognized responsibilities of the duty of fair representation in the event *adverse* consequences were indeed reasonably anticipated to impact employees ase a result of the transaction. Throughout proceedings resulting in approval it was factually represented that no adverse effects would result, nonetheless, minimum protective conditions of *NY Docks* were imposed as a matter of law. Apparently, in this case, the UTU likewise believed that no circumstances warranted a notice to negotiate transactional impact or consequences with the employer. Cf. *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Assn.* —— S.C. (No. 87-1589, slip. op. June 21, 1989 (P&LE).

[10] UTU asserts that the delay caused it to engage in nearly 2½ years of continued arbitration at a great deal of time and expense.

[11] *See* March 2 Decision, footnotes 10 and 11 at 4.

a certified copy of the arbitration proceeding record with the Commission. It also submitted a letter on February 23, 1987, that detailed its position and disputed BAP's assertions. UTU's intervention petition provided additional arguments and evidence to support its opposition to BAP's petition. UTU's arguments and evidence were fully considered in the March 2 Decision. Its petition was quite lengthy, consisting of 32 pages of facts and argument and eight extensive exhibits. There was absolutely no indication in the petition that UTU desired to submit further material. In fact, its pleading gave just the opposite impression. For example, at 30, it adopted RLEA's reply to BAP's petition and stated "[t]hat reply * * * should allow the I.C.C. to deny the petition without any further delay." [Emphasis added.] This statement clearly indicates that it desired the matter to be considered on the record as then made, and it is difficult to give credence at this juncture to any claim of inability to present a case. It stated further that "[t]his document has been filed * * * to provide the I.C.C. with the factual information it needs to understand the participation of [the] organizations in this dispute." *Id.*

Furthermore, as we stated in the March 2 Decision, and as noted *infra*, the arbitration proceeding was itself protracted, as Arbitrator Cassle bifurcated the arbitration proceeding into two phases. The original claims were filed in February 1982. Arbitrator Cassle's decision on Phase I was issued September 24, 1984, and resulted in the filing of BAP's petition on December 11, 1984. On February 6, 1985, the arbitrator issued his *nunc pro tunc* order. Hearings on individual claims were conducted on March 13-16, 1985 and February 6, 1986. Arbitrator Cassle issued his decisions on them on March 15 and May 16, 1986. While there was some delay pending our decision in *Lace Curtain*, the parties to our proceeding supplemented the record until June 1987. Indeed, issuance of *Lace Curtain* justified additional pleadings. Un-

der the circumstances, we cannot agree that UTU was the victim of unreasonable delay.

SICKLES AWARD

Arbitrator Sickles considered similar claims by those BAP employees represented by other labor organizations. The parties made submissions to the arbitrator in March 1986 and hearings were held in November 1986, in Anaconda, MT. Post-hearing submissions were filed March 1, 1987. In addition, the Organizations submitted the entire record of UTU's claims before Arbitrator Cassle. On the basis of this record, Arbitrator Sickles issued his decision on February 1, 1988, before we issued our March 2nd decision reversing Arbitrator Cassle. The Organization have petitioned for us to review Arbitrator Sickles' Award, claiming that he erred in several respects.

Sickles Findings on Causation. Contrary to Arbitrator Cassle, Arbitrator Sickles determined that causal connections had not been established between ARCO's acquisition of control of BAP and the operational changes that resulted in loss of work or dismissal of employees. From his review of the factual record, Arbitrator Sickles determined that the operational changes that affected BAP employees resulted from Anaconda's changes in operation, and not from ARCO's acquisition of control of BAP. He noted that, prior to its acquisition by ARCO, Anaconda was the principal employer and customer of BAP, and it had the power to shift work from BAP to other Aanaconda employees, to divert BAP traffic to trucks, and to eliminate work altogether. Anaconda's power to change BAP's operations continued after ARCO acquired the company. The arbitrator also found that ARCO did not participate in the day-to-day management of BAP or change Anaconda's control of BAP's operations, but that it did provide financial resources to enable Anaconda to build new facilities (such as a new kiln dryer at Butte) that led to changes in Anaconda's

copper production. He further determined that although ARCO financed the changes undertaken by Anaconda, it was those changes by Anaconda that directly caused the substantial reductions in BAP's traffic and the reffisulting elimination of jobs formerly held by BAP employees. The arbitrator noted that, had ARCO not acquired Anaconda and provided financing, BAP operations could have been curtailed earlier. He viewed the acquisition of control by ARCO as beneficial because it indirectly extended employment for BAP employees.

Weight Accorded Cassle Award. Arbitrator Sickles determined that the Cassle award involved a like case and appeared to be at least of persuasive force. After examining the record, however, he held that the Cassle award was not *res judicata.* He initially found no basis for Arbitrator Cassle's jurisdiction to enforce statements in the acquisition application. Arbitrator Sickles believed that, if the statements were enforceable, some forum other than an arbitration panel acting under Article I, section 11 of the *New York Dock* conditions would have to grant relief. He stated that a section 11 panel is limited to determining whether the transaction resulted in displacement or dismissal of employees. Enforcement of statements in the application was determined to be outside the panel's responsibilities.

Next, Arbitrator Sickles found that the Cassle Award [12] provided no reasons, explanation, or analysis for finding a causal nexus between the transaction and the adverse effect on employees. He stated further that "there is no way to know whether the [Cassle] panel examined the evidence on both sides, rated its credibility and applied

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[12] Besides the Cassle decision of September 26, 1984, Arbitrator Sickles also considered: (1) the Cassle decision issued February 4, 1984, that ruled on BAP's notice to discuss the arbitrator proceeding and determined that the panel would consider the liability of BAP for 12 post-transaction "incidents"; and (2) the *nunc pro tunc* decision.

the body of case precedence to the facts to reach its conclusion." Arbitrator Sickles further found that he could not ascertain from the Cassle record what facts Arbitrator Cassle found pertinent for each of the incidents asserted as being caused by the control transaction or the weight that was accorded to BAP's and UTU's evidence. Arbitrator Sickles thus limited the weight accorded the Cassle Award to the facts fund and articulated in that proceeding.

The first issue raised by the Organizations involves the weight Arbitrator Sickles should have accorded the Cassle Award in resolving the Organizations' claims.[13] The Organizations argued before Arbitrator Sickles that the Cassle Award was dispositive of virtually all questions of BAP's liability for *New York Dock* benefits. Here the organizations claim that Arbitrator Sickles was bound by the doctrines of *res judicata, stare decisis,* or collateral estoppel to adhere to the Cassle Award, and that he was not empowered to substitute his judgment for the judgment of Arbitrator Cassle, even if he did not agree with the conclusions of the Cassle Award. The Organizations also contest the conclusion reached by Arbitrator Sickles (contrary to Arbitrator Cassle) that a section 11 Arbitration panel lacked jurisdiction to enforce statements in the control application. They contend that the broad arbitration provisions in section 11 empower the arbitrator to resolve all issues necessary to adjudicate the dispute. To support the argument, the Organizations cite court decisions [14] reviewing arbitration awards and holding that, where there is a broad arbitration clause covering all disputes involving interpretation, or implementa-

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[13] Accordingly, they also argue that the March 2 Decision should not be considered in reviewing Arbitrator Sickles' award, but that the Sickles' award should be reviewed on the record as it existed when that award was issued.

[14] *Nat. R.R. Pass., Corp. v. Chesapeake & O. Ry.*, 551 F.2d 1346, 140 (7th Cir., 1977); *Warrior & Gulf, supra* at 584-585.

tion of a contract and absent an express provision to the contrary, only the most forceful evidence of purpose can exclude a claim from arbitration.

BAP responds that no effect should be given to the Cassle Award, citing Elkouri and Elkouri, *How Arbitration Works* (4th Ed., 1985) at 430. BAP argues that Arbirtator Sickles was under no obligation to recognize, accept, or be bound by the Cassle Award, particularly since our March 2 Decision (which was issued one month later) nullified the Cassle Award. It urges us to reject the argument that we should disregard the March 2 Decision.

BAP argues further that the Organizations improperly characterize the nature of Arbitrator Sickles' decision. It contends that Arbitrator Sickles did not misinterpret section 11 and that he properly rejected the reasoning of Arbitrator Cassle concerning enforcement of statements in the control application. It also points out that Arbritrator Sickles accurately foresaw the March 2 Decision's rejection of the Cassle interpretation.

We are not persuaded by the Organizations' contentions here. For purposes of our review we need not even reach the question of whether Arbitrator Sickles should be found by the findings of Arbitrator Cassle. Indeed, whether Sickles should have followed Cassle is moot since we have already determined that the Cassle award is based on erroneous assumptions about our intentions in imposing labor protection conditions on the control proceeding. For purposes of our review here we are certainly not bound by any of the arbitrators' decisions. Our review is in effect *de novo* with respect to those portions of an arbitral award that are properly reviewable. These reviewable arbitral findings include "the scope of labor protections imposed" by us. March 2 Decision, at 6. We are clearly not bound by arbitral findings on that subject, nor are subsequent arbitrators.

We also reject the Organizations' request to disregard the March 2 Decision affirmed here. The March 2 Decision finding the Cassle award faulty obviously undermines the Organizations' argument here. Indeed, the Sickles' Award is consistent with the March 2 Decision. However, as discussed below, our disposition of the Organizations' petition does not rely solely on the March 2 Decision.

ARCO Management of Anaconda. The Organizations next assert that Arbitrator Sickles erred in finding that ARCO took no part in Anaconda's affairs and that no ARCO officials were placed in key positions in Anaconda. It appears that Arbitrator Sickles relied on testimony of BAP's president Green reciting the history of the carrier and its operation prior to ARCO's acquisition of control. On the basis of Mr. Green's testimony, the arbitrator found that, other than providing financial assistance, ARCO took no part in the operation of Anaconda and that no ARCO official was involved in the day-to-day operation of Anaconda or BAP. He also found that no ARCO officials were placed in key positions with Anaconda and BAP.

In *Lace Curtain, supra* at 736, we indicated that we would not normally review factual determinations of arbitrators. In this case, however, we have reviewed the similar contentions with respect to the Cassle decision and rejected them. Nevertheless, we have independently reviewed the Organizations' objections to Arbitrator Sickle's findings as to ARCO's role and find these objections to be without merit.

Burden of Proof. The Organizations next argue that Arbitrator Sickles erred in determining that the adverse effects on BAP employees were not caused by the control transaction. The arbitrator commenced his discussion of causation by finding that the Organizations had satisfied

their burden under section 11(e) of *New York Dock* [15] by identifying a transaction and specifying pertinent facts of the transaction relied upon. Arbitrator Sickles then considered the carrier's evidence.[16]

The Organizations contend that, in finding that the employees satisfied their burden to identify a transaction as defined in *New York Dock*, the arbitrator had, in effect, ruled that BAP had demonstrated that the employees were adversely affected by the control transaction. They believe the arbitrator then had no choice but to extend *New York Dock* benefits to BAP employees.

We disagree with the Organizations' arguments concerning the burden of proof question. Arbitrator Sickles correctly stated the respective burdens under section 11 (e) for the employees and carriers to ascertain whether an employee is adversely affected by a transaction. If the carrier successfully shows that the employee's injury was caused by factors other than the transaction, then *New York Dock* benefits are not accorded. In other words, as we stated, in reviewing our March 2 Decision reversing Cassle, *supra*, it is well settled that if the employee is injured by external causes (such as reductions in rail service stemming from events other than the

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[15] Section 11(e) reads as follows:

> (e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

[16] Arbitrator Sickles found that, as both employer and principal customer of BAP, Anaconda had the power to change BAP's operations, to shift BAP work to other Anaconda employees or outside firms, or eliminate work altogether. Anaconda's power over BAP was not changed by ARCO's acquisition, nor did ARCO's acquisition give Anaconda any greater authority than it had prior to the acquisition. We see no reason to alter his findings.

transaction itself), then *New York Dock* benefits do not apply. *See* cases cited in March 2 Decision at 8.

Arbitrator Sickles rejected the Organization's contentions and found that the adverse impacts on BAP employes were not caused by the control transaction. *See* recital of Sickles finding. The Organizations have given us no valid reason to overturn this conclusion.

The Organizations next contend that, in § 11347, Congress mandated that employees shall not be placed in a worse position as a result of actions by the Commission in approving control transactions. They assert that public policy in § 11347 requires that employees adversely affected by a transaction will be beneficiaries of the employee protective conditions imposed by the Commission under that section. They charge that the arbitrator's decision deprived BAP employees of the value of this public policy and therefore be committed material error.

We reject this assertion. The policy of § 11347 mandates employee protection for the control transaction. This policy was satisfied by imposing the *New York Dock* conditions to provide benefits to employees directly affected by that transaction. There is no requirement in § 11347 to extend protection to employees not affected by the transaction. This is a prime reason why we disagreed with Arbitrator Cassle, for he incorrectly determined that the Commission intends employee protection to apply to employees beyond those demonstrating related injury.

Railway Labor Act. The final issue involves an assertion by the Organizations that, when the *control* transaction was approved and employee protection was imposed, employees' rights under the Railway Labor Act were suspended. Thus, argues the Organizations, since BAP employees could not enforce rights under the RLA, they should be entitled to protection under *New York Dock*. The Arbitrator did not even discuss, much less rule on, whether RLA remedies were in fact not available to BAP

employees during the period of job changes, and we will not volunteer our views on that issue. We have only ruled that *New York Dock* protection was not available and that does not turn on the existence or absence of RLA remedies.

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

1. UTU and the Organizations' respective requests for leave to exceed the 20-page limitation for their petitions are granted.

2. In Finance Docket No. 28490 (Sub-No. 1), UTU's petition to reopen, reconsider, and clarify our March 2nd decision reviewing the Award of Arbitrator Jack W. Cassle is denied.

3. In Finance Docket No. 28490 (Sub-No. 2), the Organizations' petition seeking review of the Award of Arbitrator Joseph A. Sickles is denied.

4. This decision is effective on October 21, 1989.

By the Commission, Chairman Gradison, Vice Chairperson Simmons, Commissioners Andre, Lamboley, and Phillips.

[SEAL]

NORETA R. MCGEE
Secretary

APPENDIX C

[Service Date Mar. 2, 1988]

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28490 (Sub-No. 1)[1]

ATLANTIC RICHFIELD COMPANY AND ANACONDA COMPANY —CONTROL—BUTTE, ANACONDA & PACIFIC RAILROAD COMPANY AND TOOELE VALLEY RAILROAD COMPANY

ARBITRATION REVIEW

Decided: February 17, 1988

The Butte, Anaconda & Pacific Railroad Company (BAP) filed a petition to clarify the employee protective conditions imposed in Finance Docket No. 28490, served January 17, 1978. In that proceeding, the Commission granted authority under former section 5(2) of the Interstate Commerce Act to Atlantic Richfield Company (ARCO) and its wholly-owned subsidiary, Anaconda Company of Delaware (Anaconda), to acquire control of BAP and Tooele Valley Railroad Company (TOV).[2]

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[1] We have designated this proceeding as "Sub-No. 1" to distinguish it from the control proceeding.

[2] BAP and TOV were wholly-owned subsidiaries of Anaconda Company of Montana (Anaconda-Mont.), a Montana corporation. In January 1977, ARCO acquired Anaconda-Mont. and its wholly-

To protect affected employees, applicant agreed to accept as a condition to the acquisition the so-called "*New Orleans* conditions."[3] Instead, the transaction was made subject to the employee protective conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 71 (1977) (*Oregon II*). In a subsequent decision,[4] we reopened the proceding and substituted the conditions developed in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), *aff'd. sub nom., New York Dock Ry.* v. *United States*, 609 F2d (2d Cir. 1979) (*New York Dock*).

BAP's petition stems from an arbitrator's decision finding that it is liable for *New York Dock* benefits for post-transaction job changes. It asks us to clarify the scope and application of the conditions we imposed. Specifically, BAP requests us to: (1) state that the Commission imposed only the *New York Dock* conditions, not conditions based on a pre-transaction agreement; (2) confirm that it must pay benefits only for job changes that are causally related to the control transaction; and (3)

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owned subsidiaries, BAP and TOV. Anaconda-Mont. was then merged into Anaconda, a newly formed Delaware corporation and wholly-owned subsidiary of ARCO. TOV operated a 7-mile rail line between the lead smelter of International Smelting and Refining Company at International, UT, and Warner, UT. The line was abandoned in 1981. No. AB-221, *Tooele Valley Ry. Co.—Abandonment—Between Warner and International, UT* (not printed), served November 12, 1981.

[3] *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1942), as modified in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 566 (1962) and *St. Louis Southwestern Ry.—Pur.—Alton and Southern R.*, 342, I.C.C. 498, 522 (1972).

[4] The control proceeding here was among several transactions approved under 49 U.S.C. 11343, or its precedessor section 5(2), that were reopened and modified to substitute the *New York Dock* conditions. *See* F.D. No. 28045, *et al. Kyle Rys. Inc. and New Bellefonte R. Co.—Pur.—Bellefonte Central R. Co.* (not printed), served May 20, 1980.

agree that it would be in full compliance with the *New York Dock* conditions if it refused to pay claims awarded by the arbitrator.

BAP's petition is supported by the American Short Line Railroad Association (ASLRA). ASLRA views the issue here as whether Commission-mandated employee protective conditions may be expanded beyond the scope of the transaction where they were imposed. It is concerned that, if benefits here could arise from what it terms "non-related matters", this could have a potentially adverse effect on other carriers, particularly new carriers. It agrees with BAP that we should clarify the scope of the conditions.

The petition is opposed by the Railway Labor Executives' Association (RELA). In addition, the United Transportation Union (UTU) and other unions that represent BAP employees[5] filed a petition for leave to intervene. UTU, which filed the claims involved in the arbitrator's decision, also submitted copies of orders and decisions by the arbitrator and in several court proceedings pertaining to the arbitration proceeding.[6] UTU claims that BAP distorted the findings of the arbitrator and filed its petition to avoid payment of claims.

PROCEDURAL MATTER

BAP opposes UTU's intervention as untimely and prejudicial, and as burdening the record with irrelvant information. In this regard, BAP points out that it served UTU's counsel with copies of its original petition, but UTU did not participate in this proceeding before the Commission until nearly 2½ years later.

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[5] UTU's petition was joined by: Brotherhood of Maintenance of Way Employees (BMWE); Brotherhood of Railway, Airline and Steamship Clerks (BRAC); and Brotherhood of Railway Carmen of the U.S. and Canada (BRC).

[6] On December 22, 1986, UTU filed a certified copy of the record before the arbitrator for the claims involved here.

We will permit UTU to intervene. Since our decision here will have a direct impact on UTU and the employees it represents, its participation here as a party is warranted. Moreover, many of the documents UTU submitted have previously been submitted by BAP as supplemental filings to its petition to keep us apprised of developments in the arbitration and the related court proceedings (*see* footnote 9, *infra*). Intervention will not unduly broaden the issues raised in this proceeding nor delay it.

BACKGROUND

BAP operated a 25-mile main line between Butte and the city of Anaconda, MT. Its principal function was carrying copper concentrates and related materials for Anaconda-Mont. from its mines in Butte to its smelting and drying facilities in the city of Anaconda. Approximately 97 percent of BAP's traffic was generated by its parent. TOV's operations were described above.

In the control application, ARCO and Anaconda stated that they contemplated no change in BAP's or TOV's operation and expected no adverse effect on employees resulting from the transaction. These expectations were noted in the January 17, 1978 decision. However, to satisfy statutory requirements, the *Oregon II* conditions were imposed to protect the interests of employees that might be affected by acquisition of control of BAP and TOV by ARCO and Anaconda. As indicated above, the *Oregon II* conditions were later replaced with the *New York Dock* conditions.

BAP states that the acquisition of control by ARCO and Anaconda had no effect on BAP's organization and operation. All BAP officers and employees retained the same jobs they had before the acquisition. No operating changes were made, and equipment use remained the same. Day-to-day labor relations and personnel decisions continued in the hands of the same railroad management as before the control transaction. Rail traffic and employment remained stable until 1980.

BAP notes, however, that the situation changed significantly in late 1979, when copper prices dropped. It claims that the decline in the copper market adversely affected Anaconda's operations and caused sharp reductions in traffic moved on the line. In 1980, Anaconda closed its smelter in the city of Anaconda, which was the principal source of BAP's traffic. In 1981, Anaconda closed its refining facilities in Great Falls, MT, and curtailed mining in Butte and processing in the city of Anaconda. In 1981, Anaconda built a new copper concentrate drying facility in Butte, and thus no longer had to move copper concentrate to the city of Aanconda. Some rail traffic was diverted to trucks after a fire at a tipple. It also introduced efficiencies and economies at its Butte facilities.

BAP claims that traffic losses resulting from these changes in Anaconda's operations caused it to reduce work forces in 1982. BAP asserts further that it experienced a drop of nearly 98 percent in revenue freight ton miles between 1979 and 1983. It also incurred operating losses, and thus allegedly had to eliminate jobs to cut costs.

In February of 1982, UTU (one of the eight unions having collective bargaining agreements with BAP), asserted that BAP's employees were affected by job changes cauesd by ARCO's acquisition of control and were therefore entitled to *New York Dock* benefits. It filed claims against BAP for *New York Dock* benefits on behalf of employees and called for arbitration. UTU and BAP held several meetings and exchanged correspondence between March and June of 1982 but were unable to resolve the matter. On June 8, 1982, UTU requested that the National Mediation Board appoint a neutral member of an arbitration committee as prescribed by Article I, Section 11 of the *New York Dock* conditions. The Board did so on June 24, 1982.[7]

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[7] On August 13, 1982, BAP filed suit in the United States District Court for the District of Montana against UTU seeking a de-

BAP and UTU met on June 6, 1983, before the Neutral, but again were unable to resolve the disputed claims through his mediation. Subsequently, the parties agreed to bifurcate the asbitration into two phases: Phase I to determine liability of BAP to pay *New York Dock* benefits; and Phase II to resolve individual claims.[8] Arbitration proceedings in Phase I commenced on January 16, 1984. An evidentiary record was developed, and arguments were presented. As indicated above, UTU submitted to us a certified copy of the record before the arbitrator.

The Neutral's decision on Phase I was issued September 26, 1984. He determined that BAP was liable for *New York Dock* benefits for employees adversely affected by reductions-in-force and job changes that occurred between February 15, 1978, and February 14, 1982. BAP's liability was based on the Neutral's finding that ARCO, Anaconda, and BAP entered into a pre-transaction agreement with BAP employees to accord protection for post-transaction job changes. The Neutral imputed a contract from statements made in the control application and announcements to BAP employees that employees would not be adversely affected by the transaction. He further determined that an express contract was formed between applicants and the Commission when the Commission approved the transaction in the January 17, 1978 decision and stated that employees would not be adversely affected by the transaction. He also found an implied contract when UTU relied on statements made in the application and did not object to the application in which

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claratory order that the *New York Dock* conditions were not applicable. It also sought an injunction to prevent arbitration of the dispute and enforcement of an arbitration award. The court granted UTU's motion for summary judgment and refused to interfere with the arbitration procedures established under *New York Dock*. *Butte, A. & Pac. Ry.* v. *UTU*, No. CV-82-71 Bu (D. Mont. March 3, 1983).

[8] The specific issues to be considered in the liability phase were set out in an order of the Neutral dated December 15, 1983.

ARCO and Anaconda stated they would accept a condition imposing employee protection.

The Neutral rejected as irrelevant BAP's arguments that employees were adversely affected by economic conditions that arose subsequent to the acquisition. Instead, he determined that applicants knew the industry and could have foreseen the possible decline in the copper market when they represented that the transaction would have no adverse effect on employees. He then directed BAP to post notices and make application forms available for employees to file for *New York Dock* benefits.

On December 11, 1984, BAP filed the petition here and requested that we interpret and clarify the employee protective conditions imposed when we approved the transaction.[9] BAP also filed court actions against UTU to vacate and set aside the arbitrator's decision.[10]

On February 6, 1985, the Neutral issued a so-called *Nunc Pro Tunc* order that clarified his September 26, 1984 decision. He determined that statements in their application to acquire control of BAP made by ARCO and Anaconda regarding employee protection benefits were an offer to accord the labor protection set forth in *New Orleans* (and subsequently *New York Dock*) to adversely affected employees during the term of the con-

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[9] BAP supplemented its petition by filings on January 15, February 5, February 15, and June 11, 1985, and April 6 and May 30, 1986, and June 1, 1987. The supplemental filings updated the status of arbitration and related court proceedings, although the February 5 pleading also contained substantive contentions.

[10] BAP filed a complaint in the United States District Court for the District of Wyoming, *Butte, A. & Pac. Ry.* v. *UTU*, No. C84-0523 (D. Wyo. filed December 31, 1984). On May 16, 1985, the Wyoming Court ordered the proceeding transferred to the United States District Court for the District of Montana. After receipt of additional pleadings, that court granted a stay of further proceeding, pending disposition of the arbitration "or until further order of the court." *Butte, A. & Pac. Ry. UTU*, No. CV-85-83 Bu (D. Mont. December 5, 1985).

ditions, "regardless of cause." The Neutral then found that the offer was accepted by the Commission when it approved the transaction and imposed employee protection conditions. He also found a direct causal connection between the transaction and job changes.

The arbitration then moved into Phase II to resolve individual claims. Hearings in Phase II took place May 13-16, 1985 and February 6, 1986 at which evidence was presented on 63 individual claims by BAP employees represented by UTU. The Neutral then issued decisions on March 15 and May 15, 1986 resolving each claim.[11] Arbitration panels have also been formed to hear claims filed by BWME, BRC and BRAC on behalf of their respective members for *New York Dock* benefits. According to UTU, BAP settled employee claims filed by the International Brotherhood of Electrical Workers.

On November 27, 1984, BAP filed an application under 49 U.S.C. 10903 to abandon its entire line in Docket No. AB-235. Subsequently, BAP reached an agreement with the State of Montana (Montana) for Montana to acquire BAP's entire line. Montana, in turn, agreed to lease the line to Rarus Railway Company (Rarus) for operation. *See* Finance Docket No. 30640, *Rarus Ry. Corp.—Exemption from 49 U.S.C. 10901 and 11301* (not printed), served April 26, 1985. A decision served May 10, 1985 therefore dismissed BAP's abandonment application in AB-235.[12] As a result of the sale, BAP ceased to be a rail carrier.

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[11] UTU subsequently filed suit before the United States District Court for the District of Montana to enforce the arbitration award. *UTU* v. *Butte, A. & Pac. Ry.*, No. CV-86-145-BU (D. Mont. filed December 1, 1986). UTU further advises that the Court lifted its stay of BAP's complaint (*see* footnote 10 *supra*) and consolidated the two proceedings.

[12] RLEA appealed the May 10, 1985 decision in AB-235 and petitioned to reopen the exemption decision in P.D. 30640, principally on issues relating to imposition of employee protection. On

DISCUSSION AND CONCLUSIONS

Before discussing the questions raised by BAP's petition, we will first address our authority to handle the petition.

Authority. BAP asserts several grounds upon which we may consider its petition. First, it points out that the January 17, 1978, decision reserved "jurisdiction to reopen this proceeding at a later time should the Commission find reason to do so." [13] BAP argues further that we have express authority under 49 U.S.C. 11351 "when cause exists * * * to make appropriate orders supplemental to an order made in a proceeding under sections 11342-11345 and 11347 of this title." BAP also points to our authority in 40 U.S.C. 10327(g)(1) to reopen proceedings due to substantially changed circumstances as a further basis for considering its petition. In addition, BAP cites *Anderson* v. *UTU*, 557 F.2d 165, 168-169 (8th Cir. 1977), and *Augspurger* v. *BLE*, 510 F.2d 853, 857 (8th Cir. 1975), in which the courts determined that we have primary jurisdiction to determine whether parties to a rail merger complied with an employee protective agreement relating to the transaction.

BAP states that it may be involved in arbitration proceedings with other unions representing employees to resolve similar claims. It believes that our clarification of the *New York Dock* conditions here will be use-

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April 26, 1986, we denied RLEA's appeal and petition to reopen. In *Railway Labor Executives' Ass'n.* v. *ICC* —— F.2d —— (9th Cir. August 18, 1987), the case was remanded to us to explain why labor protective conditions should not be imposed on BAP. Labor protection sought in Finance Docket No. 30640 is for actions by BAP that occurred after February 14, 1982.

[13] The January 17 decision reserved jurisdiction to consider subjecting ARCO and Anaconda to certain accounting and reporting requirements. It is arguable that this reservation of jurisdiction was limited and could not support our consideration of BAP's petition here.

ful to resolve those claims. It also contends that clarification will not involve us in the arbitration process.

RLEA (UTU concurs in RLEA's pleading) disputes the assertions by BAP that we have authority to consider the petition. It disagrees with the statutory provisions cited by BAP in its petition and contends that BAP has not established that circumstances have substantially changed to require reopening the proceeding under section 10327(g)(1). Nor, it alleges further, has BAP established "good cause" for a supplemental order under section 11351. RLEA notes that BAP does not seek modification of the previous orders in this proceeding, but rather is seeking "interpretation" as a means to involve Commission in a dispute that should be resolved through arbitration.

RLEA further argues that we have consistently followed a policy of not becoming involved in labor disputes and of prescribing arbitration procedures in the employee protection conditions we impose as the means to resolving disputes. RLEA also refers to procedures in the Railway Labor Act, 45 U.S.C. 153, *et seq.*, for appeals of arbitration decisions to the Courts.

We agree with BAP that section 11351 authorizes us to issue a supplemental decision here and clarify the conditions imposed in the control transaction. As we will discuss further below, the Neutral misinterpreted the scope of those conditions. This is "good cause" for us to issue a supplemental decision here. *See Illinois* v. *ICC*, 713 F.2d 305, 310 (7th Cir. 1985). (Since we are clearly authorized to act here by section 11351, we need not consider the other specific statutory grounds asserted by BAP.)

We have consistently refused to become involved in individual disputes arising under employee protective conditions and deferred instead to arbitration as the appro-

priate remedy.[14] Arbitration allows disputes to be resolved by those most familiar with complexities of labor law and the peculiarities of disputes involving railroad employees.[15] Until very recently, we have not been asked to review an arbitration decision awarding benefits under Commission imposed employee protection conditions. In *Chicago & North Western Tptn. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (*CNW*), we determined for the first time that our statutory mandate to impose conditions implicitly authorizes us to review an arbitrator's decision applying conditions we have imposed. The decision followed precedent established by the former Civil Aeronautics Board (CAB) in reviewing arbitration decisions under labor protection conditions it developed for airline mergers. *See Wallace* v. *Civil Aeronautics Bd.*, 755 F.2d 861 (11th Cir. 1985), *reh'g en banc den.* 762 F.2d 1023 (1985).

The standards we adopted to review arbitration decisions are based on those established by the CAB for reviewing arbitration decisions under the labor protective conditions it imposed, namely the deferential criteria set forth in the so-called *Steelworkers Trilogy*.[16] Under these standards, review of an arbitration decision is limited to determining whether the award was procedurally fair and impartial. Awards are not vacated because of substantive mistake, except when: there is egregious error; the award fails to draw its essence from the collective bargaining agreement; or the arbitrator exceeds the specific contract limits on his authority. *Loveless* v. *Eastern*

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[14] *See e.g., Haskell H. Bell* v. *Western Maryland Railway Company*, 366 I.C.C. 64, 67-68 (1982).

[15] *Leavens* v. *Burlington Northern*, 348 I.C.C. 962, 965 (1977).

[16] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Airlines Inc., 681 F.2d 1272, 1275-1276 (11th Cir. 1982). The *Steelworkers Trilogy* standards were adopted by the CAB for reviewing arbitration decisions under the labor protective conditions it imposed. *Wallace, supra.* Following this precedent, we also adopted the limited scope of review in the *Steelworkers Trilogy, see C&NW supra*, 3 I.C.C.2d at 735-736.

Our review of the arbitration decision in the context of BAP's request for clarification of the control decision is warranted here because, in finding BAP liable for *New York Dock* benefits, the Neutral misinterpreted the scope of labor protection imposed in the control proceeding. As we will discuss below, the labor protections imposed in the control proceeding were those required by statute to cover employees "affected" by the transaction. The Neutral incorrectly determined that the Commission had approved an agreement to expand the scope of the *New York Dock* conditions to cover employees affected by post-transaction job changes, regardless of cause. Under any of the tests noted above, the Neutral's finding failed to draw its essence from the conditions imposed by this agency. The Neutral also exceeded the limits of his authority as defined by the *New York Dock* conditions.

Conditions imposed. BAP asks us to clarify whether we approved or adopted pre-transaction agreements protecting employees against post-transaction job changes. We agree with BAP that clarification is warranted on this matter because we did not approve or adopt any pre-transaction agreements to award employees protection beyond the statutory minimum. We also reject the inference that the statement that "employees would not be adversely affected by the transaction" constitutes a pre-transaction agreement to expand the scope of labor protection we imposed.

The January 17, 1978 decision imposed the minimum degree of labor protection required by statute to cover

employees "affected" by the transaction. The *Oregon II* conditions originally imposed were the minimum protection required by former section 5(2)(f). The *New York Dock* protections subsequently imposed are the minimum required by section 11347.

Statements made in BAP's application and the January 17, 1978 decision were interpreted by the Neutral to constitute a pre-transaction agreement to expand the scope of the *New York Dock* conditions to cover employees affected by post-transaction job changes, regardless of cause. The Neutral misinterpreted the reason these statements were made in the application and in the January 17, 1978 decision.

One of the statutory factors the Commission must consider in an application by a rail carrier under former section 5(2) and its successor, section 11343 *et seq.*, is the interest of carrier employees affected by the transaction.[17] At the time the application was filed, specific information had to be submitted on employee impact. *See* 49 CFR 1111.1(a) (1977).[18] For example, applicants were required to submit copies of agreements with employee representatives as a result of the transaction. Here, applicants responded that no such agreement has been entered into as a result of the proposed transaction.[19] The applicants were also required to provide specific information about positions that would be affected by the transaction. The applicants stated that they contemplated that no positions would be abolished, consolidated, or transferred.[20] They also submitted a general statement that "no carrier employees are expected to be ad-

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[17] *See* 49 U.S.C. 11344(b)(1)(D), succeeding section 5(2)(c)(4).

[18] *See also Railroad Consolidation Procedures*, 348 I.C.C. 771, 806 (1977).

[19] *See* Exhibit 10-a to application of ARCO and Anaconda.

[20] *Id.*

versely affected." The January 17, 1978 decision considered applicants' evidence on employee impact and concluded that "no carrier employees are expected to be adversely affected by the proposed control of BAP and TOV." This finding was supported by the facts of the case. All that was happening in the control proceeding was that ARCO was obtaining control of BAP and TOV through Anaconda and Anaconda-Mont. The rail operations were not affected by ARCO's purchase.

Carriers and employee representatives may negotiate a greater degree of protection than the statutory minimum represented by the *New York Dock* conditions. We may also impose the higher degree of protection contained in the negotiated agreement if that is warranted by the circumstances or reason. Even if we do not impose the greater degree of protection that labor has negotiated with management, the *New York Dock* conditions allow an employee to elect between the minimum protection we impose and the greater degree of protection under any negotiated agreement.

However, no such agreement was negotiated by BAP and employee representatives. Nor did the statements made in the application and in the January 17, 1978 decision about employee impact constitute a contract to expand the scope of labor protection imposed in this transaction beyond the statutory minimum for employees "affected" by the transaction. The representation by applicants and the conclusion reached by the Commission were clearly directed to the section 11344(b)(1)(D) issue, not the section 11347 issue. The applicants stated that "no carrier employees are expected to be adversely affected" by the *acquisition* of control of BAP and TOV by ARCO. Since the acquisition of control did not itself change the nature of the operations that BAP had been conducting, nor did it change BAP's status as a subsidiary of its principal customer, Anaconda, this was a reasonable representation by the applicants and a reasonable

conclusion by this Commission based on the existing circumstances. Indeed, no employees were adversely affected following the acquisition until after the precipitous decline in the market for copper in late 1979. The Neutral took the applicant's representations and the Commission's finding regarding the effect of the acquisitions and incorrectly reached the conclusion (unsupported by the language in the application or the Commission's decision) that they constituted an agreement, adopted as binding by the Commission, to afford BAP's employees the benefit of *New York Dock* conditions for any adverse impacts arising subsequent to the transaction even though they may arise from an intervening cause unrelated to the transaction such as adverse conditions in the market for copper. The Neutral's finding is unsupported by any evidence in the record and was only reached by inferences based upon the false assumptions discussed above. Moreover, it wholly disregards two important parts of the record: (1) applicants' specific uncontradicted statement in the application that no such agreement had been negotiated; and (2) the statement in the January 17, 1978 decision imposing the *Oregon II* [later *New York Dock*] conditions that "our approval herein is conditioned upon the applicants' extending *that* [not some other, unmentioned] protection to affected employees." [Emphasis added]. The Neutral's finding that the Commission's January 17, 1978 decision constituted the imposition of a pre-transaction agreement as a condition of our approval of the merger is therefore erroneous.[21]

Causal relationship. BAP next seeks a finding that *New York Dock* benefits are limited to displacements or dismissals caused by the control transaction only. We so find.

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[21] The Neutral also found that applicants had contracted with the Commission to provide the greater protection. This is clearly unfounded.

Before an employee is entitled to *New York Dock* benefits, there must be a reasonably direct causal connection between the transaction and the injury sustained; in other words, the transaction must be the proximate cause of the injury. While we recognized in *New York Dock*, *supra*, 360 I.C.C. at 70-71, that events subsequent to the initial transaction may trigger the benefit provisions, if an employee is dismissed or displaced for reasons not connected with the transaction, he is not entitled to benefits. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 729, 730-731 (1963), *aff'd sub nom. RLEA* v. *United States*, 226 F. Supp. 521 (E.D. Va. 1964); *vacated on other grounds*, 379 U.S. 199 (1964). *Swacker* v. *Southern Ry.*, 240 F. Supp. 51 (W.D. Va. 1965), *aff'd* 360 F.2d 420 (4th Cir. 1966), *cert. denied* 385 U.S. 837 (1966); *see also Smith* v. *United States*, 211 F. Supp. 266, 269 (D. Conn. 1962).

BAP points out that the Neutral rejected its assertion that the job changes did not result from the transactions and found irrelevant that employees were affected by economic factors that occurred subsequent to the acquisition. In the *Nunc Pro Tunc* order, BAP notes the Neutral modified his conclusion and found a "direct causal relationship" between the job changes and the control transaction. BAP does not request us to review this aspect of the Neutral's decision. Rather, it requests that we confirm that the "causal relationship" basis in *Central of Georgia* applies here, and that job changes caused by traffic losses and economic factors that are not the direct result of the control transaction are not compensable under *New York Dock*.

UTU responds that the issue of causal relationship between the control transaction and job changes for BAP employees was closely examined by the Neutral. It states further that the Neutral considered the extensive evidence presented and determined that the job changes were caused by ARCO's acquisition of control of BAP. UTU

argues that BAP, as a wholly owned subsidiary of its principal shipper, Anaconda, which was also controlled by ARCO, was affected by business decisions by ARCO that diverted traffic from BAP. For example, UTU argues BAP used to carry limestone from the lime quarry to the smelter. ARCO decided to divert this traffic from BAP to independent trucking companies. Another example cited by UTU occurred when, at ARCO's direction, Anaconda's dryer facilities and lime processing facilities were relocated in Butte, curtailing BAP's handling of this traffic.

The Neutral considered 14 such incidents as "transactions" for which *New York Dock* benefits were awarded to BAP employees.[22] These included the examples noted by UTU above, as well as instances of traffic diversions and operational changes. He also considered the control transaction itself. The Neutral determined that a causal nexus was established in 13 incidents and ARCO's acquisition of BAP, and thus *New York Dock* benefits were due BAP employees.[23]

In *CNW*, *supra*, 3 I.C.C.2d at 736, we stated that we will not review factual issues of causation. These issues are best left to the arbitrator. Here, however, the Neutral's determination of causation issues was based on the flawed premise that the Commission intended *New York Dock* benefits imposed in the control transaction to cover any and all future adverse effects on BAP employees. As we stated above, the Neutral misinterpreted the Commission's intention. His conclusions, particularly on post-transaction job changes, are thus faulty and the facts need to be reevaluated.

The precedents established in *Southern Ry.*, *Swacker*, and *Smith*, *supra*, confirm that the adverse impact on an

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[22] *See* Order of Neutral dated December 15, 1983.

[23] *See* Order of Neutral dated February 3, 1984, in which the Neutral rejected one incident as not being causally related to the control transaction.

employee must be caused directly by the transaction for that employee to be accorded benefits under the conditions we imposed. When the injury results from external factors, such as a reduction in the demand for rail service, labor protection is not meant to apply. The concern of the Congress and the Commission has been that the burden of the adverse impact of mergers and other transactions approved by the Commission would not be borne solely by labor. But where, as here, the injury results from factors such as the decline in the copper market rather than the transaction upon which the conditions are imposed, no basis exists for affording the affected employees the protections they seek here. The record shows that, upon acquisition of control (in 1978) no operating changes were made (or apparently even contemplated) and conditions were stable for quite some time. Anaconda's post-1979 changes were made not as a result of its 1978 acquisition of control but as a result of changing market conditions in the copper industry. The drop in copper prices caused it to reevaluate the Anaconda, Great Falls and Butte operations and produced the adverse effects on BAP and its employees. *Cf. Burlington Northern, Inc.—Control & Merger—St. L.*, 360 I.C.C. 784, 949-50 (1980). Accordingly, we find that the neutral erred in his analysis.

Payment of claims. Finally, BAP seeks confirmation that it is in compliance with the *New York Dock* conditions if it declines to pay employee benefits in dispute.

UTU and RLEA respond that BAF is attempting to avoid payment of claims awarded by the Neutral. They argue further that *New York Dock* conditions provide that an arbitration decision is final, binding, and conclusive. They assert that we should recognize this and support the Neutral's decision and remove any reason for BAP to delay the final resolution of the dispute.

We understand the concerns of UTU for a final resolution of claims. However, BAP has raised valid issues concerning the scope and effect of the *New York Dock*

conditions imposed in the control proceeding. Even though an award is to be "final, binding and conclusive," it is nonetheless an order of the Commission. *United Transp. Union* v. *Norfolk & Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987). As such, it is subject to our review to resolve these issues. *CNW, supra*, 3 I.C.C.2d at 734. *See also Red Star Express* v. *Teamsters*, 809 F.2d 103 (1st Cir. 1987), where the court found no impropriety in an employer's refusal to pay an adverse award pending judicial review. *See also, Letter Carriers* v. *Postal Service*, 590 F.2d 1171, 1178-79 n. 11 (D.C. Cir. 1978).

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. UTU's petition to intervene is granted.

2. BAP's petition is granted to the extent discussed in the decision.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley commented with a separate expression.

NORETA R. MCGEE
Secretary

(SEAL)

COMMISSIONER LAMBOLEY, commenting:

I would have remanded this proceeding to the arbitrator to re-evaluate the factual issues in light of our findings here regarding the scope and application of the protective conditions.[1]

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[1] See my previous separate expression on the parameters of our policy regarding review of arbitration matters in Finance Docket No. 30853, *L. A. Rowlett, Jr.* v. *Missouri Pac. R.R. Co.* (not printed), served August 19, 1987. See also Finance Docket No. 28583, *Burlington Northern, Inc.—Central and Merger—St. Louis—San Francisco Railway Company* (not printed), served November 13, 1987.

APPENDIX D

[Service Date May 20, 1980]

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28054

KYLE RAILWAYS, INC. and NEW BELLEFONTE RAILROAD COMPANY—PURCHASE—BELLEFONTE CENTRAL RAILROAD COMPANY BETWEEN BELLEFONTE AND CHEMICAL IN CENTRE COUNTY, PENNSYLVANIA

Finance Docket No. 28072

CONSOLIDATED RAIL CORP. and DELAWARE AND HUDSON RAILWAY COMPANY—JOINT CONTROL—ALBANY PORT RAIL CORP. TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY
ALBANY RAILROAD CORP.

Finance Docket No. 28490

ATLANTIC RICHFIELD COMPANY and ANACONDA COMPANY —CONTROL—BUTTE, ANACONDA AND PACIFIC RAILWAY COMPANY and TOOELE VALLEY RAILWAY COMPANY

Finance Docket No. 28496

DES MOINES UNION RAILWAY and DES MOINES TERMINAL COMPANY—EXCHANGE OF RAILWAY PROPERTIES—IN THE CITY OF DES MOINES, IOWA

Finance Docket No. 28586 (Sub-No. 1)

MISSOURI PACIFIC RAIL COMPANY—MERGER—MISSOURI PACIFIC RAIL COMPANY

Finance Docket No. 28614 (Sub-No. 1)

NEW RAIL COMPANY, INC.—PURCHASE—THE WESTERN PACIFIC RAIL COMPANY

Finance Docket No. 28643 (Sub-No. 1)

NORFOLK AND WESTERN RAILWAY COMPANY—ACQUIRE BRANCH TRACK DETROIT, TOLEDO & IRONTON RAILWAY COMPANY

Finance Docket No. 28654 (Sub-No. 1)

ITEL CORPORATION—CONTROL—GREEN BAY AND WESTERN RAILROAD COMPANY

Decided: May 14, 1980

By decision served February 26, 1980, in Finance Docket No. 28250, *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, embraced and reported in *Oregon Short Line R. Co.—Abandonment Goshen*, 360 I.C.C. 666 (1980), the Commission requested interested persons to furnish petitions for reopening regarding proceedings bearing entry dates within the period of February 5, 1976, and February 22, 1979, both inclusive, which were filed under 49 U.S.C. 11343 (or its predecessor Section 5(2), other than trackage rights or lease cases). Such reopening would be to implement the employee protective provisions established in the decision of the Commission served February 23, 1979, in Finance Docket No. 28250, *New York Dock Railway—Control—Brooklyn Eastern District Terminal, (New York Dock)*, as mandated by 49 U.S.C. 11347.

The eight involved proceedings were specifically identified in the Appendix to the decision in the *New York Dock* case reported at 360 I.C.C. 666 as requiring reopening.

By several petitions in the above-entitled proceedings, each filed March 26, 1980, Railway Labor Executives' Association seeks the imposition of the employee protective provisions established in the February 23, 1979, decision in the *New York Dock* case, in lieu of those provisions previously imposed in the decisions entered in those proceedings.

By petition filed April 7, 1980, James T. Mular, Director, Montana State Legislative Committee, Brotherhood of Railway & Airlines Clerks, makes a similar request in Finance Docket No. 28490.

Des Moines Union Railway Company (DMU) and Des Moines Terminal Company (DMT), jointly replied to RLEA's petition in Finance Docket No. 28496 on April 14, 1980.

Norfolk and Western Railway Company (N&W) replied to RLEA's petition in Finance Docket No. 28643, on April 16, 1980.

DMU and DMT state that the *New York Dock* employee protective provisions are inappropriate since the transaction in Finance Docket No. 28496, simply involved a real estate transaction with transefr of 1.931 miles of DMH right-of-way and facilities to a non "operating" carrier DMT, in exchange for 2.497 miles of DMT right-of-way and facilities. According to the replicants, no change in operations were involved since both before and after the transaction only DMH operated and operates on DMT's as well as DMH's own tracks. Inasmuch as no employees were affected by the transaction, nothing would be gained by requiring an implementing agreement or arbitration prior to implementation of the transaction, which was previously effected on January 31 and February 1, 1978, respectively.

N&W notes that the order in Finance Docket No. 28643 (Sub-No. 1), served November 29, 1978, conditioned approval of the transaction, which had been implemented previously, on "the labor protective provisions to be finally formulated by the Commission in F.D. 28250, *New York Dock Ry.—Control—Brooklyn Eastern Dist.*" Since the *New York Dock* case provisions were finally formulated by the Commission's decision served February 23, 1979, in that proceeding, no useful purpose would be served by reopening Finance Docket No. 28643 (Sub-No. 1) to expressly reference the decision in the latter proceeding. Finally, N&W notes that the requirement of Article I, section 4 of the provisions in *New York Dock* for a prior implementing agreement, can have no applicability under these circumstances.

Retroactive imposition of the employee protective provisions of *New York Dock* is mandatory in the involved proceedings. See our discussion in *Oregon Short Line R.*

Co. Abandonment—Goshen, 360 I.C.C. 666 at 675-677 (1980).

Moreover, replicants do not appear to be prejudiced by such action. The transaction in Finance Docket No. 28496 clearly will not be affected. Article I, section 4 of the *New York Dock* case provisions requiring a prior implementing agreement would appear to apply only to "a transaction which . . . may cause the dismissal or displacement of any employees or rearrangement of forces." But as noted by replicants, no employees have been affected whatsoever by their transaction.

The transaction in Finance Docket No. 28643 (Sub-No. 1) also will not be affected by this reopening. As noted by N&W, the decision authorizing the consummation of the transaction in Finance Docket No. 28643 conditioned approval on the labor protective provisions finally formulated in *New York Dock*. Thus, express incorporation of these provisions in Finance Docket No. 28643 (Sub-No. 1) at this time would be inconsequential. Moreover, to the extent any consequences result from our actions herein, we noted at 360 I.C.C. 676:

> Although we recognize that such retroactive application may be a burden on railroad carriers, adequate notice of this requirement is afforded by the statute itself.

In accordance with 49 U.S.C. 11347, and our decision reported at 360 I.C.C. 666, each of the prior decisions in the involved proceedings is modified as follows: All prior references to employee protective provisions are deleted. In lieu thereof, consummation of the transaction is made subject to provisions at least as protective of employees as those set forth in Appendix III to the decision in Finance Docket No. 28250, *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, served February 23, 1979.

Any prior action with respect to each transaction, which (1) has adversely affected employees, and (2) is inconsistent with the employee protective conditions as modified herein, is null and void.

It is ordered:

(1) The above-described petitions in these proceedings are granted.

(2) The prior decisions of the Commission in these proceedings are modified as described herein.

(3) Except as modified herein, the prior decisions of the Commission in these proceedings stand as the decisions of the Commission.

(4) This decision is effective on the date of service.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX E

[Service Date Jan. 17, 1978]

INTERSTATE COMMERCE COMMISSION

ORDER

Finance Docket No. 28490

ATLANTIC RICHFIELD COMPANY and ANACONDA COMPANY —CONTROL—BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY and TOOELE VALLEY RAILWAY COMPANY

By application filed June 17, 1977, the Atlantic Richfield Company (Atlantic Richfield), Pennsylvania corporation, of Los Angeles, California, and its wholly owned subsidiary, The Anaconda Company (Anaconda-Del), a Delaware corporation, of New York, New York, seek authority under section 5(2) of the Interstate Commerce Act (Act) for Anaconda-Del, and in turn, Atlantic Richfield through the transaction, to acquire control of The Butte, Anaconda & Pacific Railway Company (BAP), of Anaconda, Montana, and The Tooele Valley Railway Company (TOV), of Tooele, Utah. BAP and TOV are both rail carriers subject to Part I of the Act. Atlantic Richfield and Anaconda-Del are not carriers within the meaning of any section of the Act, and neither is affiliated, directly or indirectly, with a motor or water carrier subject to the provisions of the Act.

BAP and TOV were wholly-owned subsidiaries of the Anaconda Company (Anaconda-Mont), a Montana cor-

poration. That company was acquired by Atlantic Richfield, which merged it into a newly-established wholly-owned subsidiary, Anaconda-Del. Prior to the acquisition and merger, Anaconda-Mont placed the BAP and TOV stock in an independent voting trust, United States Trust Company of New York, trustee. The application now before the Commission seeks authorization for Atlantic Richfield, and in turn, for Anaconda-Del, to acquire control of BAP and TOV.

The application was filed under the regulations adopted in Ex Parte No. 282 (Sub-No. 1), *Railroad Consolidation Procedures*, 348 I.C.C. 771, 801 (1977), revising Part 1111 of the Commission's regulations, to be modified in 49 C.F.R. 1111. Notice of the application was published in the Federal Register on July 8, 1977. The only opposition expressed is that of the Railway Labor Executives' Association (RLEA) and the Brotherhood of Railway, Airline and Steamship Clerks (BRAC).

No change in the current operations of either rail carrier is anticipated as a result of the control sought herein. The two railroads were managed separately under the control of Anaconda-Mont and their separate management is expected to be continued.

BAP operates 45.872 miles of railroad within Montana, including 25.295 miles between Butte and Anaconda. It renders freight service only, connecting with Burlington Northern, Inc. (BN) and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee Road) at Butte, the Milwaukee Road at Rocke, and the Milwaukee Road and Union Pacific Railroad Company (UP) at Silver Bow. The line was constructed in 1982 to connect the copper mines at Butte with the Anaconda Company's reduction works in Anaconda. This remains its principal function although it moves other types of freight along its lines from one function of Anaconda-Del to another. According to applicants, the only point of commercial sig-

nificance on the BAP line not served by some other railroad is the city of Anaconda. Less than one percent ($27,000) of the BAP operating revenues represents traffic moving in or out of the city of Anaconda originating from or destined to a shipper other than The Anaconda Company or one of its contractors.

TOV operates 7 miles of railroad within Utah, between Warner and International. It renders freight service only, connecting with UP and Western Pacific Railroad Company (WP) at Warner. The line was built to connect the lead smelter of International Smelting and Refining Company (a wholly-owned subsidiary of The Anaconda Company) with the main lines of the UP and WP at Warner. Since the closing of that lead smelter in 1976, traffic on the line has been minimal. Only 17 carloads of freight moved over the line in 1976.

Four required exhibits are not included in the application. These are Exhibits B-13 through B-16, respecting revenue carload data, revenue and commodity information, traffic study information, and information regarding the operations. Applicants filed a motion to waive submission of these exhibits as part of the application. They argue that it would be unduly burdensome to produce the information in those exhibits, since neither carrier has an automated data processing system retrieving system. Thus, producing the data would be time-consuming and would require the employment of additional clerical personnel, it is asserted. Applicants further maintain that the information is not relevant to an analysis of the merits of this application, since the carriers are quite small and no changes in operations are anticipated.

We agree that in this situation the exhibits not submitted would be unduly burdensome to require, in view of the limited value of the information in this context. The petition to waive submission of exhibits B-13 through B-16 of the application is granted. However, we must

emphasize that petitions for waiver of the *Railrod Consolidation Procedures* in this respect should be filed prior to the filing of the application itself. See *Burlington Northern, Inc.—Control & Merger—St. L.*, 354 I.C.C. 182 (1977).

No carrier employees are expected to be adversely affected by the proposed control of BAP and TOV by Atlantic Richfield and Anaconda-Del. However, to protect the interests of the railroad employees that may be affected, applicants state their willingness to accept as a condition of the Commission's approval the so-called "New Orleans Conditions". *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1942), as modified in *Southern Ry. Co.—Control of Georgia Ry. Co.*, 317 I.C.C. 557 (1962) and *St. Louis Southwestern Ry.—Pur.—Alton and Southern R.R.*, 342 I.C.C. 498, 522 (1972). RLEA and BRAC maintain that the appropriate employee protective conditions to be imposed are those prescribed in section 402 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), P. L. 94-210, which amended section 5(2)(f). That section provides that employee protective conditions imposed must contain:

> provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

The degree of protection to be afforded affected employees, under the amended section 5(2)(f), has been discussed by the Commission in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977), and our approval herein is conditioned upon the applicants' extending that protection to affected employees.

Section 5(4) of the Act, as amended, provides that the Commission, in its discretion, may subject a noncarrier authorized to acquire control of one or more rail carriers

to certain provisions dealing with accounting and reporting requirements and securities issuances. Applicants request that they not be subject to these provisions, arguing that no useful purpose would be served by doing so. The income and assets of the rail carriers are an extremely small portion of those of Anaconda-Del and Atlantic Richfield.* Applicants further argue that their control of the BAP and TOV will have little or no effect upon transportation in America. We agree that Anaconda-Del and Atlantic Richfield should not be subjected to the requirements of section 5(4) at this time. However, we will reserve jurisdiction to reopen this proceeding at a later time should the Commission find reason to do so.

We find that the interests of employees will be protected by the imposition of appropriate conditions, no other railroad has requested to be included in the transaction, the transaction will not result in the guarantee or assumption of payment of dividend or fixed charges; that no fixed charges would be incurred as a result of the transaction; the terms of the transaction are just and reasonable; that the transaction is within the scope of section 5(2) of the Act and is consistent with the public interest; and this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The strict time constraints imposed by the Railroad Revitalization and Regulatory Reform Act of 1976 make it necessary to expedite all proceedings concerning common carriers by railroad. Accordingly, requests for extensions or postponements of due dates for filing an ap-

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* The two carriers' combined assets in 1976 constitute less than 3 percent of those of its parent company, and were less than .1 percent of those of Atlantic Richfield. The net income of BAP in 1976 constituted less than 10 perecnt of that of its parent company, and amounted to .13 percent of the after tax income of Atlantic Richfield. TOV did not experience any net income in 1976.

peal will be scrutinized closely and will be granted only upon a showing of extraordinary circumstances. Any appeal must be filed within 20 days after service of the initial decision or within such further period (not to exceed 20 days) as may be authorized.

It is ordered that:

1. The application is approved and authorized, subject to the terms and conditions referred to above;

2. This order shall become effective 30 days from the date served;

3. If the authority granted herein is not exercised within one year from the effective date hereof it shall be of no further force and effect.

By the Commission, Review Board No. 5, Members Krock, Pohost and Taylor, decided December 14, 1977.

H. G. HOMME, JR.,
Acting Secretary

(SEAL)

APPENDIX F

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Civil Action File No. CV-82-71-BU

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, (B A & P), a Montana Corporation,
Plaintiff,

vs.

UNITED TRANSPORTATION UNION—TRAINMEN AND ENGINEMEN, LOCAL NO. 887 (UTU), an unincorporated association; and UNITED TRANSPORTATION UNION (UTU), an international labor organization,
Defendants.

JUDGMENT

[Filed Mar. 2, 1983]

This action came on for (hearing) before the Court, Honorable PAUL G. HATFIELD, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Defendants' Motion for Summary Judgment is granted.

DATED AT Butte, Montana, this 2nd day of March, 1983.

LOU ALEKSICH, JR.
Clerk
U.S. District Court

By /s/ Doreen F. Hugo
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

No. CV-82-71-Bu

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY (BA&P), a Montana corporation,
Plaintiff,

vs.

UNITED TRANSPORTATION UNION—TRAINMEN AND ENGINEMEN, LOCAL NO. 887 (UTU), and unincorporated association; and UNITED TRANSPORTATION UNION (UTU) an international labor organization,
Defendants.

MEMORANDUM and ORDER

[Filed Mar. 2, 1983]

Plaintiff, B.A.&P. Railway, has brought this action against the defendant labor organizations (U.T.U.), seeking declaratory and injunctive relief.

The defendants have moved for dismissal or for a stay of these proceedings pending arbitration. Defendants have appended to their brief numerous exhibits pertaining to the matters involved herein. Generally, once the court accepts extraneous material and considers it in connection with a Rule 12(b)(6), Fed.R.Civ.P. motion to dismiss, the motion must be treated as a Rule 56 motion for summary judgment. Further, it is often necessary for the court, to give notice of its intention to so consider the motion. However, in this case each of the parties have submitted extrapleading material and have

argued in the context of a summary judgment motion. Therefore, the court will proceed herein to decide the motion as one for summary judgment.

I

The B.A.& P. Railway and the Tooele Valley Railway were formerly owned by the Anaconda Company, a Montana corporation. Anaconda (Montana) merged with Atlantic Richfield Corporation (ARCO) in 1977. ARCO also owns the Anaconda Company, a Delaware Corporation. ARCO and Anaconda (Delaware) sought to acquire ownership and control of the two railways. Such an acquisition is a "transaction" subject to the provisions of Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2) (1976), now recodified at 49 U.S.C.S. § 11343 which provides *inter alia*:

> (a) The following transaction involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may be carried out only with the approval and authorization of the Commission:
>
> . . .
>
> (4) acquisition of control of at least 2 carriers by a person that is not a carrier.

49 U.S.C.S. § 11345 provides *inter alia* that:

> If a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under . . . [49 U.S.C.S. §§ 10501 et seq.] is involved in a proposed transaction under Section 11343 of this title [49 U.S.C.S. § 11343] this section and section 11344 of this title [49 U.S.C.S. § 11344] also apply to the transaction.

49 U.S.C.S. § 11347 provides *inter alia* that:

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and

> 11345 or section 11346 of this title . . . , the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45 [45 U.S.C. § 565]. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission . . . .

On June 17, 1977, ARCO and Anaconda (Delaware) applied to the I.C.C. for approval of the proposed acquisition of the two railways. The application recited that the "proposed transaction is one within the scope of § 5(2)(a) of the Act", stated that no changes in the operation of the railways was contemplated and stated that no employees were expected to be adversely affected if the transaction was approved. The applicants noted, however, that in order to protect employees that might be affected by the transaction the applicants would find acceptable the protective conditions of the *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, as subsequently modified.

On January 17, 1978, the I.C.C. issued its order in Finance Docket No. 28490, approving the application, conditioned as follows:

> The degree of protection to be afforded affected employees, under the amended section 5(2)(f) has been discussed by the Commission in *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977),

> and our approval herein is conditioned upon the applicants' extending that protection to affected employees.

Subsequently, on May 14, 1980, the I.C.C. amended its orders in 8 cases including Finance Docket No. 28490, as follows:

> All prior references to employee protective provisions are deleted. In lieu thereof, consumation of the transactions is made subject to provisions at least as protective of employees as those set forth in Appendix III to the decision in Finance Docket No. 28250, *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, served February 23, 1979.

The primary business of the B.A.& P. involved the transportation of materials between the mines in Butte, Montana and the refining facilities in Anaconda, Montana. In 1980, ARCO closed the Anaconda smelter. In 1981, ARCO reduced the work force both in Butte and Anaconda and completed an ore concentrate drying facility in Butte.

In February of 1982, notices were posted on B.A. & P. employee bulletin boards to the effect that changes and reductions would begin to be implemented. Various meetings and correspondence ensued. The representatives of the defendants claimed entitlement to the benefits of the *New York Dock* conditions. The representatives of the plaintiff maintained the position that *New York Dock* was not triggered because the changes in the B.A. & P. employee work force were due to economic factors unrelated to the transaction approved in Finance Docket No. 28490. By letter dated May 20, 1982 the defendants were notified that the plaintiff had made a final decision that employees were not entitled to the benefits of *New York Dock*. On May 25, 1982 the defendants notified plaintiff of their intent to seek arbitration, designated

an employee representative for the arbitration panel and requested that the plaintiff designate a member. On June 1, 1982 the plaintiff indicated its intention to not designate a member or to arbitrate. On June 8, 1982 the defendants requested the National Mediation Board to appoint a neutral member to decide the issue of the employees' entitlement to benefits. On June 24, 1982 the National Mediation Board appointed a neutral to sit with representatives of the parties herein in order to decide the matter. A hearing was set to commence on August 17, 1982. Requests for continuances were denied. By letter dated August 17, 1982 the defendants notified the neutral member that plaintiff was filing an action in federal court with reference to the dispute but that employee representatives had not been served with process and that the defendants were prepared to proceed with the hearing. This action was filed in this court on August 13, 1982.

II

The complaint herein seeks a declaratory judgment that defendants are not entitled to arbitration and that the *New York Dock* conditions are not applicable to these circumstances. The plaintiff further seeks an injunction preventing defendants' attempts to arbitrate or to enforce an arbitration award.

While there is some confusion arising from the arguments of counsel as to what "transaction" is alleged by defendants to have triggered the *New York Dock* conditions, there is no dispute that the ARCO acquisition of B.A. & P. was a "transaction", the I.C.C.'s approval of which was conditioned upon the plaintiff's compliance with Appendix III of *New York Dock*. The issue ultimately to be decided is whether the necessary causal nexus exists between this transaction and the B.A. & P.'s reduction in work force. The question before this court, given rise to by the defendants' motion, is whether reso-

lution of the ultimate issue can be had by way of arbitration.

The plaintiff argues that there is not even an arguable connecetion between the acquisition of B.A. & P. by ARCO and the curtailment in B.A. & P.'s work force. Further, the plaintiff argues that the defendants have severed any causal connection between the transaction and the cutbacks in May of 1982 by stipulating in the context of an unemployment compensation agreement that "no transaction as defined under [*New York Dock* conditions] has occurred prior to the date hereof." Finally, the plaintiff argues that the I.C.C. excluded disputes pertaining to the duty to arbitrate from arbitration jurisdiction in Appendix III, Article I, § 11 of *New York Dock*.

The May, 1982 agreement referred to above was an agreement between the Anaconda Copper Company and the defendant unions whereby the Company agreed to pay supplemental unemployment compensation to furloughed B.A. & P. employees. The last 3 paragraphs of the agreement are as follows:

> The parties agree that any rights members may have under Finance Docket Numbers 28250 and 28490, as revised by ICC decision dated May 14, 1980, copy attached, involving any action of the B.A. & P. after the date hereof are not abrogated.
>
> It is further understood and agreed that no "transaction" as defined under Finance Docket Numbers 28250 and 28490, revised by ICC decision dated May 14, 1980, has occurred prior to the date hereof.
>
> Factual information existing prior to the date of this agreement may be used to substantiate that a "transaction" occurred at the time subsequent to the date of this agreement.

Whether or not events subsequent to the B.A. & P. acquisition by ARCO constituted a "transaction" need

not be decided to resolve the matters presently under consideration by this court. It cannot be denied that the said acquisition itself was a transaction. The context in which the language quoted by plaintiff appears indicates, as defendants argue, that this language was intended to mean that the agreement itself was not triggered by a transaction as defined in the I.C.C.'s order approving the B.A. & P. acquisition and in *New York Dock*.

The court also believes that the plaintiff misconstrues the intended effect of the language in Appendix III, Article I, § 11 which states:

> In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, *except section 4 and 12 of this article I* within 20 days after the dispute arises, it may be referred by either party to an arbitration committee.

(emphasis added). This section goes on to detail the procedure for selecting the arbitration committee, sets detailed time limits, etc. Article I, § 11(e) provides:

> In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Disputes over the application of section 4 are excepted from the application of the procedures set forth in section 11. Section 4 provides for notice, negotiation and mediation procedures to be followed when a railroad anticipates a transaction that may adversely affect employees. Section 12, likewise excepted from the application of the

procedures set forth in section 11, deals with benefits for employees forced to change their residences due to employment changes, and contains its own mechanism for resolution of disputes. No other section of Article I, Appendix III contains its own conflict resolution procedures.

III

Reduced to essentials, defendants argue that there is a sufficient nexus between the transaction in question and the employee curtailments for the employees to be entitled to benefits. The plaintiff disputes this connection. It appears to the court that disputes such as this arising within the four year protective period of 49 U.S.C.S. § 11347, were intended by the I.C.C. to be resolved through the process of binding arbitration provided for in Article I, § 11 of Appendix III, of *New York Dock*, as ordered in the I.C.C.'s approval of the transaction. Subsection (e) of Section 11 sets forth the respective burdens of proof with respect to this dispute.

THEREFORE IT IS ORDERED and this does order that the defendants' motion for summary judgment be and the same is hereby granted.

Done and dated this 1st day of March, 1983.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
United States District Judge.

APPENDIX G

ARBITRATION

UNDER

NEW YORK DOCK II, APPENDIX III

(Jack W. Cassle, Neutral)

Finance Docket No. 28490

IN THE MATTER OF BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY (BA&P),
Carrier,

and

UNITED TRANSPORTATION UNION, T & E (UTU),
Organization.

ORDER

THE ABOVE-CAPTIONED ACTION having come before the Neutral for the second phase of the bifurcated hearing as previously ordered and the BA&P having appeared by and through its attorney, Donald C. Robinson, of the firm Poore, Roth & Robinson, P. C., and its Carrier Member of this Board, Robert M. Solari and the United Transportation Union (UTU) having appeared through its attorney, David M. McLean, of the firm Knight, Dahood, McLean & Everett, and its Employee Member of this Board, Vice-President Kenneth Levin, and both parties having had the opportunity to present their witnesses, exhibits and arguments in support of their respective positions and, at the close of such hearing the Neutral having left the record open pending review of the records, testimony of witnesses and exhibits furnished by

the parties, the Neutral issues this interim ruling upon the issues raised therein, and makes the following Findings and Order.

A. DISCUSSION AND FINDINGS

The parties, in general, complied with the Phase I Findings and Order.

The parties now come before the Neutral and this Board for the purpose of resolving the disputes of the employees who filed claims as provided in the Phase I Order.

The hearings in the Phase II proceedings were commenced on May 13, 1985 and continued through 12:00 noon, May 16, 1985 at Fairmont Hots Springs, Montana.

The Carrier presented a MEMORANDUM identified as "STATED REASONS FOR DENIAL OF CLAIMED NEW YORK DOCK BENEFITS, dated February 11, 1985, copy of such MEMORANDUM is appended hereto as Appendix A.

The Carrier requested rulings during the hearings on each Reason for Denial. Such rulings were held pending completion of the evidentiary record concerning each employee's claim.

The rulings on the Memorandum's statements are now made.

"1. You have failed to show a job displacement that is a result of the control transaction approved by the I.C.C. in Finance Docket 28490.

(a) You have failed to specify pertinent facts of that transaction relied upon."

The pertinent facts of the "transaction" have been detailed in Phase I of these proceedings. It would be superfluous and it is hereby found to be unnecessary for

each employee claimant to come in now and be required to specify either the pertinent facts of the transaction or the causal connection with the job displacement.

The parties are hereby ordered to comply with the above.

"2. There was no job displacement that occurred between February 15, 1978 and February 14, 1982."

49 U.S.C. 5(2) (2) provides:

> In its Order of Approval the Commission shall include terms and conditions providing that during the period of four (4) years from the effective date of such Order, such transaction will not result in employees of the Carrier or Carirers by railroad effected by such Order being in a worse position with respect to their employment, . . .

On February 1, 1982, a date within the four year period of the effective date of the I.C.C. Order in this Finance Docket, all employees of the Carrier were placed on extra board service, an act which had the immediate effect of placing each employee of the Carrier in a worse position with respect to his employment. The effect of such an act was to make seniority within the crafts and under the respective governing labor agreements the only criteria for work on a daily basis with the ultimate and conclusive result of loss of earnings. This act by the Carrier eliminated all regularly assigned runs and/or operations.

The above-referenced statute does not require actual job displacement during the four (4) year period. It only requires that an employee be placed in a *worse position.* On any railroad, the act of being placed on an extra board is an action which results in an employee being placed in a worse position with its attendant irregularity of hours, jobs (yard, road etc.) and loss of earnings due to the application of the seniority consideration governing work

assignments. This worse position result did, in fact, occur on the railroad.

The parties are hereby ordered to comply with the above.

"3. You did not hold a position with the Butte, Anaconda and Pacific Railway Company as of February 15, 1978."

On page 10 of the Phase I Order, the following statement was made:

> The question then becomes whether such representations and the subsequent grant of authority to acquire the BA&P conditioned thereon are sufficient to form a basis for extending New York Dock II, Appendix III, Benefits, to UTU members employed as of February 14, 1978.

Notwithstanding the above, it is consistent with the statutory scheme involved and it is hereby ordered that if any employee of the Carrier, no matter what the date of hire, is placed in a worse position with respect to employment and/or earnings during the four (4) year period following the date of the I.C.C. Orders, that employees should be entitled to benefits. The statutes and I.C.C. Orders do not place a restriction for extending benefits only to those persons who were employees on the date of the I.C.C. Order. It is the stated public policy of the I.C.C. that no employees are to be effected by an acquisition or merger of railroads and that policy should extend to all employees of the railroad no matter when employed.

The parties are hereby ordered to comply with the above.

"4. You have not verified that you are a member of the United Transportation Union at the time covered by the application for benefits."

The need for membership in the United Transportation Union at the time of the I.C.C. Order is not a require-

ment by statute or the Phase I Award. The only requirement is that the individual be an employee. The specification of Union membership in the Phase I discussion is improper under the I.C.C. Order and the statute.

The parties are hereby ordered to comply with the above.

"5. The record of compensation shows that you did not sustain any adverse compensation effects from the job displacement alleged in your application."

The time period of six years from the date of an adverse action or of being placed in a worse position is six (6) years as stated in the text of New York Dock II, Appendix III.

As identified during the hearing, each employee was adversely affected insofar as employment and/or earnings is concerned. The six (6) year period expires on January 31, 1988.

The parties are hereby ordered to comply with the above.

"6. You refused the offer of steady work on May 9, 1978."

This offer was not reasonable nor practical nor possible under the circumstances of craft jurisdiction in the railroad industry. The steady work consideration, if one did exist under the statute and I.C.C. Order, would be a requirement only within the employee's craft.

The parties are hereby ordered to comply with the above.

"7. Due to your death (within the time frame) you are not entitled to benefits."

The question is whether such benefits are vested in the employee prior to his date of death, and if so, his personal representative or executor should be entitled to claim such vested benefits as an asset of the estate of the employee.

The Carrier, by its actions alone, has made it impossible for those deceased employees to enjoy any of the benefits provided under New York Dock II, Appendix III. Therefore, the deceased employee's estate is due an amount computed as provided in New York Dock II, Appendix III, plus interest at the Montana statutory rate.

The parties are hereby ordered to comply with the above.

"8. Due to your resignation on (date) you are not entitled to benefits."

The employees who resigned are in the same position as those who became deceased or retired. The principle is the same for each category.

The parties are hereby ordered to comply with the above.

"9. Due to your retirement on (date) you are not entitled to benefits."

The employees who retired on or before February 14, 1982, or thereafter are entitled to benefits under New York Dock II, Appendix III, provided a factual basis is established by each such claimant that he chose to retire based solely upon his belief that if he did not retire then, he would suffer a loss of retirement benefits from those which he normally would be entitled to at age sixty-five (65) under Railroad Retirement Rules and Regulations.

Any retirement payments received are to be an off-set against whatever New York Dock II, Appendix III, Benefits which accrued as result of the Order in Phase I and in this Phase II Order.

The parties are hereby ordered to comply with the above.

"10. This application was not signed by the person stated in the application as an employee applying for benefits."

Claims not signed by the employee provided the employee is competent to do so are denied.

"11. You, as beneficiary of the Cantrell Agreement, effective May 29, 1981, agreed that no "transaction" as defined under I.C.C. Finance Dockets 28250 and 28940 occurred prior to the effective date of the Agreement.

The Cantrell Agreement does not eliminate any requirement under the I.C.C. Order or under the Phase I Order previously issued in this matter.

The payments received under the Cantrell Agreement were not a gift. Therefore, such payment qualifies as an off-set against any entitlement under New York Dock II, Appendix III Benefits.

All benefits under New York Dock II, Appendix III are to bear interest at the Montana statutory interest rate from the date upon which the employee suffered an adverse impact on his earnings. The parties are to make such computation as to the amount of benefits due and payable to each employee.

The parties are hereby ordered to comply with the above.

"12. Due to your dismissal for cause on (date) you are not entitled to benefits."

The only employee in this category is R. T. King who was reinstated under Public Law Board No. 3133.

R. T. King is entiled to New York Dock II, Appendix III Benefits but his earnings from other employment are to be an off-set against the benefits as computed by the parties.

The parties are hereby ordered to comply with the above.

"13. The issue of anticipation of a transaction on August 26, 1977, was dismissed by the Order of February 3, 1984.

The above represents the findings and rulings relative to the Carrier's requested rulings in its Memorandum of Stated Reasons for Denial of Benefits.

In addition, the Carrier's consideration of the time lost by BA&P employees due to the 1980 strike at the Anaconda Company's facilities as voluntary time off is improper and such was the ruling during the hearing. The ruling requires the Carrier to recompute the base hourly and base earnings guarantee. Such computation is a matter of arithmetic. It is ordered that agreement be achieved by the parties of the resulting change in the base hourly and earnings guarantee.

Further, the Carrier's argument that since the BA&P has new ownership as of April 27, 1985, the BA&P has no further liability for New York Dock II, Appendix III Benefits is incorrect. The BA&P and ARCO have a joint responsibility for the six (6) year period ending January 31, 1988 and it is so ordered.

AWARD AND ORDER

The parties are to recompute the base hourly and base earnings guarantee under the rulings of this Phase Two Order.

The parties are to achieve agreement as to the total benefits due and payable under this Order.

The Employee's counsel is to take those steps necessary to establish factually the effect of the early retirement of each of those retires who terminated employment due to the effect of the establishment of the extra board for job assignment purposes upon future retirement benefits.

The Neutral and the Board will retain jurisdiction for Phase II of this Aribtration until such time as all questions are resolved and the benefits paid.

The recomputation of benefits is to be completed no later than thirty (30) days from the date that the second (2nd) Board Member signs this Order.

7/7/85
Date

/s/ Jack W. Cassle
JACK W. CASSLE
Chairman
and Neutral Member

_____
Date

ROBERT M. SOLARI
Carrier Member

7/20/85
Date

/s/ Kenneth Levin
KENNETH LEVIN
Employee Member

February 11, 1985

APPENDIX A

MEMORANDUM

STATED REASONS FOR DENIAL OF CLAIMED NEW YORK STATE DOCK BENEFITS

1. You have failed to show a job displacement that is a result of the controlled transaction approved by the ICC in Finance Docket No. 28490.

   (a) You have failed to specify pertinent facts of that transaction relied upon.

2. There was no job displacement that occurred between February 14, 1978 and February 15, 1982.

3. You did not hold a position with the Butte, Anaconda and Pacific Railway as of February 15, 1978.

4. You have not verified you are a member of the United Transportation Union at the times covered by the application for benefits.

5. The record of compensation shows that you did not sustain any adverse compensation effects from the job displacement alleged in your application.

6. You refused the offer of steady work on May 9, 1978.

7. Due to your death (within the time frame), you are not entitled to benefits.

8. Due to your resignation on (date), you are not entitled to benefits.

9. Due to your retirement on (date), you are not entitled to benefits.

10. This application was not signed by the person stated in the application as an employee applying for benefits.

11. You, as beneficiary of the Cantrell Agreement effective May 29, 1981, agreed that no "transaction" as defined under ICC Finance Dockets 28250 and 28490 occurred prior to the effective date of the Agreement.

12. Due to your dismissal for cause on (date), you are not entitled to benefits.

13. The issue of anticipation of a transaction on August 26, 1977 was dismissed by the Neutral's Order of February 3, 1984.

APPENDIX H

ARBITRATION
UNDER
NEW YORK DOCK II, APPENDIX III
(Jack W. Cassle, Neutral)

Finance Docket No. 28490

IN THE MATTER OF

BUTTE, ANACONDA & PACIFIC
RAILWAY COMPANY (BA& P),
Carrier,

and

UNITED TRANSPORTATION UNION, T & E (UTU),
Organization.

NUNC PRO TUNC ORDER

THE ABOVE-CAPTIONED MATTER and the Order dated the 26th day of September, 1984, having become the subject of a Complaint to Vacate and Set Aside Arbitration Award and for Injunctive Relief filed in the United States District Court for the District of Wyoming under Civil Docket C84-0523, and also being the subject of a Petition before the Interstate Commerce Commission, both now pending, and both such proceedings having as their basis certain alleged ambiguities and/or questions regarding the construction of the language contained in the original Order entered herein, the Neutral deems it to be in the best interests of the parties hereto to clarify such Order Nunc Pro Tunc by including in such Order the following Findings:

1. The June 17, 1977, Application to the I.C.C. and the representations of the Applicants to the Organizations and employees regarding employee protective benefits made contemporaneously with the Application, constituted an offer to the I.C.C. that, if the Application was approved, *New Orleans* protective conditions would be extended to any employee who subsequently, became adversely affected during the term of such conditions, regardless of cause.

2. The January 17, 1978, Order of the I.C.C. accepted such offer and specifically conditioned the approval of the acquisition upon the extension of the *New Orleans* conditions.

3. The January 17, 1978, Order of the I.C.C. is a "transaction" wthin the definition of 49 U.S.C. 5(2).

4 A direct causal connection exists between such transaction and the job reductions and changes complained of by the members of the Organization herein.

5. Therefore, the employees who have been affected by such job reductions and changes are entitled to receive those protective benefits ordered by the I.C.C. in its later modification of the approval Order which imposed *New York Dock* conditions.

THIS NUNC PRO TUNC ORDER becomes effective on the date of the signature of the second (2nd) panel member.

2/6/85
Date

/s/ Jack W. Cassle
JACK W. CASSLE
Chairman
Neutral Member

_____
Date

JOHN W. GREENE
Carrier Member

2/25/85
Date

/s/ Kenneth Levin
KENNETH LEVIN
Organization Member

APPENDIX I

ARBITRATION
UNDER
NEW YORK DOCK II, APPENDIX III
(Jack W. Cassle, Neutral)

Finance Docket No. 28490

IN THE MATTER OF

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY (BA& P),
Carrier,

and

UNITED TRANSPORTATION UNION, T & E (UTU),
Organization.

ORDER

THE ABOVE-CAPTIONED ACTION having come before the Neutral for the initial phase of the bifurcated hearing as previously ordered and the BA& P having appeared by and through its attorney, Donald C. Robinson, P.C., and its President, Mr. John W. Greene, and the UTU having appeared by and through its attorney, David M. McLean, of the firm Knight, Dahood, McLean & Everett, and its Vice-President, Mr. Kenneth Levin, and both parties having had the opportunity to present their witnesses, exhibits and arguments in support of their respective positions and, at the close of such hearing the Neutral having left the record open pending production of documents from the BA& P and the BA& P having provided its Response to such Order for produc-

tion of documents and the Neutral having received a written position of the UTU concerning the BA& P's Response to such Order for production of documents and having further received the Response of the BA& P thereto and further exhibits and documentation having been supplied by the parties, the Neutral has declared the record in this initial phase of the bifurcated hearing to be closed and, ruling upon the issues raised therein, makes the following Findings and Order.

A. BACKGROUND

The parties to this dispute are the BUTTE, ANACONDA AND PACIFIC RAILWAY COMPANY, hereinafter referred to as the BA& P, and the UNITED TRANSPORTATION UNION and its LOCAL UNION NO. 887, hereinafter referred to as the UTU.

The BA& P is a "carrier by railroad" within the meaning of the Interstate Commerce Act, 49 U.S.C. Section 1, *et seq.*, and the Railway Labor Act, as amended, 45 U.S.C. Section 151 and the UTU is an international labor organization and the duly designated representative of the Enginemen and Trainmen employees of the BA& P.

The BA& P railroad lines were constructed in 1892 to connect the copper mines at Butte, Montana with smelting and drying facilities at Anaconda, Montana. It operates approximately 118 miles of railroad within the State of Montana, including about 25 miles between Butte and Anaconda, Montana. It provides freight service only to connecting railroads.

The transaction of copper concentrates, and other related materials has been the principal function of the BA& P railroad operations. Other transportation and shipping operations of the railroad were minimal.

On January 12, 1977, the Atlantic Richfield Company, hereinafter referred to as ARCO, acquired the Anaconda Company. The Anaconda Company's subsidiary, the BA&

P was a part of this acquistion. The acquisition of the BA& P could not be completed until approval was granted by the Interstate Commerce Commission, hereinafter referred to as the I.C.C.

On January 17, 1978, the I.C.C. issued its Finance Docket No. 28490 which provided for such acquisition by ARCO and the Anaconda Company and, in addition, provided for certain labor protective conditions commonly known as the *New Orleans* conditions. Subsequent to this approval, the I.C.C. modified its approval by extending the provisions of what is commonly kown as the *New York Dock* conditions to the employees of the BA& P *New York Dock Railway—Control, Docket* No. 28250, 360 I.C.C. 60, 76-90 (1979).

These labor protective provisions are applicable to both railroads acquired in this transaction. The Tooele Valley Railroad and the BA& P were separate entities and remain separate entities inasmuch as no consolidation, coordination, interchange, etc. was physically possible due to the location of each. In 1980, the Anaconda Company closed its copper smelter facilities in Anaconda, Montana, and its copper refinery facilities in Great Falls, Montana. This closure resulted in a reduction of its shipping volume on the BA& P.

In 1981, the Anaconda Company reduced the level of its mining and processing operations in Butte and Anaconda with an additional reduction in shipping volume on the BA & P.

On or about February 26, 1982, the UTU wrote to BA& P stating that the railroad's actions required the BA& P to provide for the application of the *New York Dock* conditions. Meetings, conversations and correspondence between BA& P and the UTU occurred between March and June of 1982.

On or about June 8, 1982, the UTU requested the National Mediation Board to appoint a Neutral member of

an arbitration board as provided under the *New York Dock* conditions.

On June 17, 1982, the BA& P wrote the National Mediation Board indicating its position that the UTU was not entitled to the application of the *New York Dock* conditions including arbitration of the dispute.

On or about June 24, 1982, the National Mediation Board appointed Jack Cassle as the Neutral member of the arbitration board.

The Neutral scheduled the arbitration proceedings to commence on August 17, 1982.

Under date of August 13, 1982, the BA& P, through counsel, sought a declaratory judgment to stop the arbitration, to provide that the *New York Dock* conditions were not applicable to the circumstances that created this dispute and to enjoin the UTU from proceeding with arbitration and enforcement of any arbitration award.

On March 1, 1983, the United States District Court for Montana issued its order which mandated proceeding with the arbitration of the dispute.

The BA& P appealed the District Court order but did not pursue such appeal.

On June 6, 1983, a meeting of the parties under the auspices of the Neutral was held in which certain specifics for proceeding with the arbitration were ordered.

Subsequent to this meeting, an agreement to mediate was entered into with such mediation being concluded without success.

Subsequent to the mediation effort, an agreement was reached to bifurcate the proceedings into (a) arbitration of liability issues and (b) arbitration of claims if required.

The arbitration of the issues was completed and the record closed.

B. DISCUSSION

The issue which finally presents itself to this Neutral for determination can be summarized as follows:

WHETHER THE ACQUISITION OF THE BA& P BY THE ATLANTIC RICHFIELD COMPANY AND THE ANACONDA COMPANY IS A TRANSACTION WHICH WOULD ENTITLE THE EMPLOYEES OF THE BA& P AS OF FEBRUARY 15, 1978, TO BENEFITS UNDER *NEW YORK DOCK II*, APPENDIX III.

On June 17, 1977, the Atlantic Richfield Company and the Anaconda Company filed an Application to acquire control of the Butte, Anaconda & Pacific Railway Company and the Tooele Valley Railway Company pursuant to Section 5(2), of the Interstate Commerce Act under the above-referenced Finance Docket. Several of the statements contained in such Application relevant to this arbitration are as follows:

1. III

INFORMATION RESPECTING APPLICANT
ATLANTIC RICHFIELD COPANY

G. "The Atlantic Richfield Company is not controlled by any corporation or corporations. It is the real party in interest to this Application . . . ."

2. IV

INFORMATION RESPECTING APPLICANT
THE ANACONDA COMPANY

G. "The Anaconda Company is a wholly owned subsidiary of the Atlantic Richfield Company. It is the real party in interest to this Application . . . ."

3. VI

INFORMATION RESPECTING THE
STATUTORY STANDARDS

C. "No changes in the operations of the railroads are contemplated, and they will continue to

render efficient and economical transporation service to the public."

F. "No Carrier employees are expected to be adversely affected; however, to protect the interests to the railroad employees that may be affected a fair and equitable arrangement that the applicants *would be willing to accept as a condition for the Commission's approval of the proposed transaction* would be those known as the *New Orleans* conditions (*New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, as modified in *Southern Ry. Co.—Control of Georgia Ry. Co.*, 317 I.C.C. 577, 317 I.C.C. 729, and 320 I.C.C. 377)."

(Emphasis added.)

4. Included with the application is the "Verification of Applicant The Atlantic Richfield Company" consisting of an Affidavit of L. M. Cook, Vice-President of the Atlantic Richfield Company, swearing to the completeness and accuracy of the contents of the Application.

5. Also attached to the Application is the "Verification of Applicant The Anaconda Company" in the form of an Affidavit of Richard B. Steinmetz, Jr., Vice-President and General Counsel of the Anaconda Company, swearing to the sompleteness and accuracy of the contents of the Application.

6. Attached to the Application as Exhibit 10-a "Information Regarding Employees of B.A.P" are the following representations:

"(i) No such [implementing] agreement has been entered into as a result of the proposed transaction.

(ii) All personnel are covered under the Railroad Retirement Act.

(iii) It is not contemplated that any positions will be effected by the proposed transaction.

(vi) There has been no attrition of positions in the six (6) years preceding the filing of this Application. The Railroad employed one hundred forty-five (145) employees in 1976 and the same number in 1971."

7. Exhibit 11 to the Application "Proposed Notice" states at paragraph (ii):

"The nature of the proposed transaction is for the acquisition of control of the two carriers subject to Part 1 of the Interstate Commerce Act, by persons which are not a carrier, namely, the Atlantic Richfield Company and The Anaconda Company."

8. On January 17, 1978, the Interstate Commerce Commission issued its Order under the above-referenced Finance Docket which included the following provisions:

No change in the current operations of either rail carrier is anticipated as a result of the control sought herein. The two railroads are managed separately under the control of the Anaconda-Mont and their separate management is expected to be continued.

* * * *

No carrier employees are expected to be adversely effected by the proposed control of BAP and TOV by Atlantic Richfield and Anaconda-Del. However, to protect the interests of the railroad employees that may be affected, *applicants state their willingness to accept as a condition of the Commission's approval the so-called "New Orleans Conditions". New Orleans Union Passenger Terminal Case,* 282 I.C.C. 271 (1942), as modified in *Southern Ry. Co.—Control of Georgia Ry. Co.,* 317 I.C.C. 557 (1962) and *St. Louis Southwestern Ry.—Pur.—Alton & Southern R.R.,* 342 I.C.C. 498, 522 (1972). RLEA and BRAC maintain that the appropriate employee protective conditions to be imposed are those prescribed in Section

402 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) P.L. 94-210, which amended Section 5(2)(f). That Section provides that employee protective conditions imposed must contain:

> provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 USC 565).

The degree of protection to be afforded affected employees, under the amended Section 5(2)(f), has been discussed by the Commission in *Oregon Shortline R.R. Co.—Abandonment—Goshen*, 354 I.C.C. 76 (1977) and our approval herein is conditioned upon the Applicant's extending that protection to affected employees.

(Emphasis added.)

* * * *

We find that the interests of employees will be protected by the imposition of appropriate conditions . . . .

* * * *

It is ordered that:

1. The application is approved and authorized, subject to the terms and conditions referred to above;

9. By decision dated May 20, 1980, under the above-referenced Docket Number and others, the Interstate Commerce Commission ordered:

> In accordance with 49 U.S.C. 11347 and our decision reported at 360 I.C.C. 666, each of the prior decisions in the involved proceedings is modified as follows: All prior references to employee protective provisions are deleted. In lieu thereof, consummation of the transaction is made subject to provisions at

> least as protective of employees as those set forth in Appendix III to the decision in Finance Docket No. 28250, *New York Dock Railway—Control—Brooklyn Eastern District Terminal*, served February 23, 1979.

The above-referenced Application and Orders are set forth for the purpose of emphasizing the representations made to the Interstate Commerce Commission by the applicants and the reliance thereon by such Agency in granting the permission to the Applicants to acquire the BA& P.

The question then becomes whether such representations and the subsequent grant of authority to acquire the BA& P conditioned thereon are sufficient to form a basis for extending *New York Dock II*, Appendix III, benefits to UTU members employed as of February 15, 1978.

Counsel for the BA& P has framed the issues in the following manner:

> . . . the important part of our case will focus on the aspect of the case that is legally significant to the resolution of the issues presented here, and that is the causal nexus between the new ownership of the Anaconda and its subsidiary, the BA& P Railroad, and the subsequent events that resulted in manpower reductions on the railroad. That is, whether or not the events that resulted in the manpower reductions were made, "pursuant to" the I.C.C. approval of the merger in January of 1978.

Hearing Transcript, Vol. 3, Page 3.

The UTU, on the other hand, phrased the issue as follows:

> . . . the contention of the Organization in this case is that the word "transaction" defines situation or

situations where events occur which cause loss of earnings or loss of job opportunities of BA& P employees, particularly UTU operating employees, in those events which directly resulted from the acquisition of the BA& P by ARCO. In other words, to phrase the question in the manner that the Carrier doesn't seem to like, *would these adverse effects have occurred but for or except for the acquisition of the BA& P by ARCO.*

(Emphasis added.) Hearing Transcript, Vol. 1, Page 38.

In determining this ultimate question then, reference must be made to the statutory scheme involved.

49 U.S.C. 5(2). Unifications, Mergers and Acquisitions of Control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) in this paragraph—

. . . for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefore shall present an application to the Commission,

* * * *

If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an Order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable . . . .

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others:

* * * *

(4) The interest of the carrier employees affected.

* * * *

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this Chapter, the Commission *shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.* In its Order of approval the Commission shall include terms and conditions providing that during the period of four (4) years from the effective date of such Order, such transaction will not result in employees of the carrier or carriers by railroad effected by such Order being in a worse position with respect to their employment, ...

(Emphasis added.)

Details of the requirements of such an Application referred to in 49 U.S.C. 5(2)(b) are set forth in 49 C.F.R. § 268.31 as follows:

To the extent applicable to the proposed transaction, each submission shall contain—

(c) With regard to rail employees of the proponent—

(1) A description of all projected changes in employment as a result of the proposed transaction;

(3) For any projected employment decreases, an explanation of how they will be handled and an

> estimate of the total costs of labor protection associated with the proposed transaction.

A substantive factor in the determination of the issue presented herein involves the definition of the operative term "transaction." At least one court has discussed such a definition and its comments are instructive:

> Section 5(2) involves "transactions" to achieve certain stipulated ends; these transactions require the approval of the Commission. There is no definition given of what goes into a "transaction," but it appears to be a catchall referring to the many different elements involved in mergers, leasing agreement, pooling arrangements or joint operations. As often described in other contexts, *it is a word "of flexible meaning"* and "may comprehend a series of many occurrences depending not so much upon the immediacy of their connection *as upon their logical relationship*". *Texas & NOR Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (1962). See also *Smyth v. United States*, 293 F.Supp. 387 (1968).

(Emphasis added.)

The BA& P and the UTU have agreed that the acquisition of the BA& P by ARCO and Anaconda was a "transaction" within the definition of such term set forth in Paragraph 1(a), Appendix III of *New York II*. The Neutral concurs that the January 17, 1978, acquisition was a transaction and that, if employees of the BA& P were affected by such transaction, they are entitled to *New York Dock II* benefits.

To determine if BA& P employees were affected by the agreed-upon transaction, it is initially imperative to examine the circumstances surrounding the application for I.C.C. approval.

The record herein contains numerous notices and announcements from the BA& P and the applicants to the BA& P employees and the public relative to the proposed acquisition and its effects on BA& P employees. (UTU Exhibits 6, 11, 12, 13, 14, 15, 16, 19, 21, 22, 24 and 38). Representative of such announcements is the July 7, 1976, letter from John B. M. Place to Anaconda employees, a copy of which was sent to BA& P employees on July 15, 1976, by Leo V. Kelly, President and General Manager of the BA& P Mr. Place's letter contains the following:

> You can be assured that the board of directors and management of Anaconda are unanimous in our view that a merger with Atlantic Richfield would be in the best interest of our employees. We believe that Atlantic Richfield will contribute important strengths to our company. We also believe that the basic businesses in which we are involved are strong businesses, important to our economy, and that in future years we will be in an even better position to serve our customers, our employees, and the communities in which we operate.

An additional, important factor in analyzing the circumstances surrounding the proposed acquisition is the absence of any implementing agreements between the BA& P and the UTU. The application to the I.C.C. contains the affirmative statement that "No such agreement has been entered into as a result of the proposed transaction." I.C.C. Application, Exhibit 10-a, paragraph (i).

In fact, no need for an implementing agreement existed. No consolidation or coordination could accrue from this transaction due to the physical location of the BA& P and the Tooele Valley Railroad Company. No employee could be adversely affected under these circumstances. Any changes for either railroad in working conditions,

rules, switching limits, yard consolidations would have to have been accomplished under the procedures of the Railway Labor Act, as amended.

The BA& P in its presentation, has sought to avoid payment of *New York Dock II* benefits on the theory that the reductions in work force subsequent to the acquisition of the BA& P occurred solely in response to changes in the economy of the copper industry and that such reductions were not related, in any way, to the acquisition which constituted an agreed-upon transaction.

Such a position is without merit in light of the above cited applicants' submissions to the I.C.C. and the reasonable conclusions and expectations to be drawn therefrom.

It is essential to note that it is a matter of public policy as stated in the Interstate Commerce Act and executed by the I.C.C. that no employees are to be affected by an acquisition or merger of railroads. Such has been basic since the Washington Job Protection Agreement of May, 1936.

The acquisition of a carrier by a non-carrier is rare but not unique. Acquisitions of carriers by carriers involve a recognition by all parties of the changes in operation which, by necessity and the economies of the situation, will accrue or occur. Such changes, and the effects of such changes on employees of the carriers, are provided for by agreements between the carriers and the employee representatives which may or may not be provided to the I.C.C. at the time of a carrier's application for merger. Employees affected by the merger or acquisition within the contemplation of such agreements are extended benefits as provided for in the I.C.C. Order. This procedure normally results in all known effects to or on employees being *identified* and *dealt with* in a manner acceptable to the I.C.C.

In the acquisition of the BA& P by ARCO and Anaconda, no such effects were identified or dealt with. Instead, the applicants chose to represent to the I.C.C., the BA & P employees and the public that there would be *no* effects. The publicized ARCO and Anaconda announcements contained affirmative and specific representations that the acquisition of the BA & P would result in more stability of the employment situation. Reason then can only dictate that the only effects to the employees of the BA & P after the acquisition would be those that might result from *economic* considerations.

The applicants voluntarily provided for employee protection by the statements and representations contained in their application agreeing to the imposition of conditions which extend benefits to employees who will be affected. It is therefore irrelevant that the employees were affected by economic factors which arose subsequent to the acquisition.

In essence, the issue to be determined by this Neutral is in the nature of contract interpretation. The applicants, by their notices and announcements to the BA & P employees and to the public, and by their representations to the I.C.C. in their application, formed an contract. There was an express contract formed between the applicants and the I.C.C. at the time of the January 17, 1978, Order. There was an implied contract formed when the UTU relied upon the statements in the application and did not object to the application in which ARCO and Anaconda voluntarily conditioned approval upon the imposition of employee protection benefits.

The terms of the express representation by the applicant's relating to employee protection are clear and unambiguous. The question becomes one of application of such provisions to the present situation.

Changes in economic conditions are foreseeable to such a degree that it is reasonable to impute knowledge of such

factors to the applicants in this case. It is unconceivable to this Neutral that the applicants, with their vast collective knowledge of the world mineral market and the analytical resources available to them, could not have foreseen at least a possibility of a decline in copper production and the resultant effect on the employees of the BA & P at the time they made the affirmative representations of "no adverse effect." It does not strain at reason in the specifics of this transaction to then find that the purpose of the provision for employee protection benefits as a condition of approval was to protect those employees who were affected by such economic factors. This Neutral cannot reasonably conclude that the statements of the applicants in their application for approval of this transaction were made as a meaningless gesture or put forth in bad faith.

It is not a proper defense for the BA & P to claim that under its prior ownership or under other, less financially stable ownership, the effects of the economic downturn on the employees of the BA & P would have been more drastic. No person or entity other than ARCO and the Anaconda Company represented and committed to and contracted with the I.C.C., the BA & P employees and the public that the employees of the BA & P would be protected and not adversely affected. No person or entity other than ARCO and the Anaconda Company was granted the right to acquire the BA & P based upon such *condition.*

Stated in light of the analogy of the BA & P's counsel, if the owner of the Orange Julius franchise had made contractual commitments to his employees prior to the time that the price of oranges became exhorbitant due to factors beyond his control, he would not be relieved of such contractual obligations unless his contracts so provided. Hearing Transcript, Vol. 3, Page 4.

C. AWARD

The remedy for the affected employees is compensation. *Brotherhood of Maintenance of Way Employees v. United States*, 81 S.Ct. 913 (1961).

The BA & P is hereby ordered to post the Notice attached hereto at its business office, on all employee bulletin boards for its Enginemen and Trainmen and to take any and all steps to publicize the applicaton of the *New York Dock II* conditions as applicable to the reductions in force or changes in employment during the period February 15, 1987 through February 14, 1982.

The BA & P is ordered to make available the application form contained herein from the office of the President effective no later than October 1, 1984. Such applications are to be received by the BA & P at the office of the President during the period beginning October 1, 1984, through October 31, 1984.

The BA & P is granted one (1) calendar month following the receipt of an application to verify the facts of the application and to make arrangement for the payment accruing therefrom.

A dispute arising between an employee and the BA & P as to eligibility, compensation, or application of the provisions of *New York Dock II* which cannot be resolved between the parties is to be submitted to Neutral, Jack W. Cassle, for final disposition. Such dispute must be presented in writing to the Neutral, Jack W. Cassle, 4510 East 13th Street, Cheyenne, Wyoming 82001 with copies of such being provided to the BA & P and the United Transportation Union.

Such written request for a final determination is to be received by the Neutral no later than January 1, 1985.

THIS ORDER becomes effective on the date of the signature of the second (2nd) Panel Member.

9/26/84
Date

/s/ Jack W Cassle
JACK W. CASSLE
Chairman and Neutral Member

Date

/s/ See Attached Dissent
JOHN W. GREENE
Carrier Member

10/5/84
Date

/s/ Kenneth Levin
KENNETH LEVIN
Organization Member

NOTICE TO ALL EMPLOYEES REPRESENTED BY UTU LOCAL NO. 887

Under date of September 26, 1984, Neutral Jack W. Cassle has issued his award and order in Finance Docket No. 28490.

Under the terms of the order, the BA & P employees represented by the UTU Local 887 who were on the rolls of the BA & P as of February 15, 1978 are to be and hereby are notified that *Applications For New York Dock II* Benefits are available from the Office of the President for developing the basis for any benefits due under the terms of *New York Dock II*.

The application forms will be available November 1, 1984 thru November 30, 1984.

As provided in the order, the BA & P has one calendar month following the receipt of an application to verify the facts of the application and to make arrangement for the payment accruing therefrom.

A dispute arising between an employee and the BA & P as to eligibility, compensation, or application of the provisions of *New York Dock II* which cannot be resolved between the parties is to be submitted to Neutral Jack W. Cassle for final disposition. Such dispute must be presented in writing to the Neutral Jack W. Cassle at his residence address of 4510 East 13th Street, Cheyenne, Wyoming, Wyoming 82001 no later than January 1, 1985.

Copies of such request for final determination is to be provided to Mr. John W. Greene, President of the BA & P and the General Chairman of the United Transportation Union, Local No. 887.

_____

John W. Greene, President
Butte, Anaconda & Pacific Railway Company

_____

Date

APPLICATION FOR NEW YORK DOCK II BENEFITS

TO John W. Greene
President & General Manager
Butte, Anaconda & Pacific Railway
P.O. Box 1421
Anaconda, MT 59711

I, _____,
(Full Name as Shown on Employment Records)
was employed by the Butte, Anaconda & Pacific Railway Company on February 15, 1978, in the position of _____. I was affected by the actions of the Atlantic Richfield Company and its subsidiary, the Anaconda Comruary 14, 1982, by virtue of a furlough reduction in pany, during the period from February 15, 1978, to Febwhich placed me in a worse position with respect to my development than that I was in on February 15, 1978. I have identified below to the best of my ability the date of each such action and the effect of such action upon my employment.

Date of 1st action. _____ 19——.

What happened? _____.

Date of 2nd action. _____ 19——.

What happened? _____.

Date of 3rd action. _____ 19——.

What happened? _____.

(If any other dates are necessary, list on reverse side along with explanation of what happened.)

I request the Butte, Anaconda and Pacific Railway Company to provide me the appropriate benefits of the NEW YORK II employee protective provisions.

_____

Signature

_____

Date of Application

cc: General Chairman UTU (T)
General Chairman UTU (E)

APPENDIX J

ARBITRATION
UNDER
NEW YORK DOCK II, APPENDIX III
(JACK W. CASSLE, ARBITRATOR)

Finance Docket No. 28490

IN THE MATTER OF
BUTTE, ANACONDA AND PACIFIC RAILWAY COMPANY
(B.A. & P.),
Carrier,

-and-

UNITED TRANSPORTATION UNION, T&E (U.T.U.),
Organization.

ORDER GRANTING IN PART AND DENYING IN PART THE CARRIER'S MOTION TO DISMISS

THE ABOVE-CAPTIONED MATTER having come before the Arbitrator for the initial phase of the bifurcated hearing for the purpose of the presentation of the Organization's case and the Organization having appeared by and through its attorney, David M. McLean, of the firm KNIGHT, DAHOOD, McLEAN & EVERETT, and Mr. Kenneth Levin, Vice-President of the United Transportation Union, and the Carrier having appeared by and through its attorney, Donald C. Robinson, of the firm POORE, ROTH & ROBINSON, P.C., and Mr. John Greene, President of the Butte, Anaconda and Pacific Railway Company, and the Organization having presented its evidence and testimony relevant to the issues identified

in that December 15, 1983, Order of this Arbitrator, and, at the close thereof, the Carrier having made a Motion to Dismiss all issues raised by the Organization and having heard the arguments of counsel relative thereto, and having reviewed each of those exhibits submitted by the Organization as part of its pre-arbitration submission, and being otherwise fully advised in the premises, finds as follows:

1. That the Motion to Dismiss the carrier relative to the issues raised in Paragraphs 1 (a), (c), (d), (e), (f), (g), (h), (i), (j), (k), (m) and (n) should be denied.

2. That the Motion to Dismiss of the Carrier as it relates to Paragraph 1 (b), should be granted, based upon the failure of the Organization to establish a sufficient causal nexis between the acquisition of the Carrier by ARCO under the above-referenced Finance Docket and the change of working conditions (moonlight prohibition) resulting from that Operational Bulletin dated August 26, 1977.

3. That the Motion to Dismiss of the Carrier as it relates to Paragraph 1 (1) should be granted, based upon the failure of the Organization to establish a sufficient causal nexis between the acquisition of the Carrier by ARCO pursuant to the above-referenced Finance Docket and the leasing of Track Number 6 (Burlington Northern).

4. That the Carrier's Motion to Dismiss as it relates to Issue Number 7 (Whether a penalty against the B.A. & P. is appropriate) should be granted.

5. That the parties have stipulated and this Arbitrator so finds that the date applicable for tolling of the time provisions of Appendix III, *New York Dock II*, relative to the claims raised by the Organization is February 15, 1978, and that, therefore, under 49 U.S.C. 11347, the time period within which claims may have matured over

which this Arbitrator has jurisdiction is four (4) years from that date.

IT IS THEREFORE ORDERED that the Motion to Dismiss of the Carrier be, and the same hereby is, granted as to Issues 1(b) and 1(1) and Issue 7.

IT IS FURTHER ORDERED that the Motion to Dismiss of the Carrier be, and the same hereby is, denied as to the remaining subparagraphs contained in Issue 1.

IT IS FURTHER ORDERED that the applicable date for the tolling of time provisions of Appendix III, *New York Dock II*, in this matter is February 15, 1978.

IT IS FURTHER ORDERED that the time set for the Carrier's presentation relaitve to the issues set forth in the December 15, 1983, Order of this Arbitrator which have not been disposed of herein shall be February 27, 28 and 29, 1984, at Jackson, Wyoming, commencing at 9:00 o'clock, A.M., each day.

DATED this 3rd day of February, 1984.

/s/ Jack W. Cassle
JACK W. CASSLE
Arbitrator

APPENDIX K

ARBITRATION
UNDER
NEW YORK DOCK II, APPENDIX III
(Jack W. Cassle, Arbitrator)

Finance Doc. 28490

IN THE MATTER OF
BUTTE, ANACONDA & PACIFIC RAILWAY
COMPANY (B.A.P.),

- and -

UNITED TRANSPORTATION UNION, T & E (UTU).

ORDER GRANTING UTU MOTION FOR BIFURCATION AND DENYING B.A.P. MOTION TO COMPEL DISCLOSURE OF INFORMATION UNDER SECTION 11(e), APPENDIX III

The above-captioned matter having come before the Arbitrator upon the Motion to Compel Disclosure of Information under Section 11(e) of Appendix III filed herein by the B.A.P. and the Motion for Bifurcation of Issues filed herein by the UTU and the B.A.P. having filed their objection to Bifurcation and this Arbitrator being otherwise fully advised in the premises finds that in the interest of efficient management of the numerous issues presented, in the interest of determining, at the outset, which of the occurrences are entitled to *New York Dock II* Treatment, the Motion for Bifurcation of Issues of the UTU should be granted.

To further clarify this ruling and to delineate the substance of the proceeding which is scheduled to commence on January 16, 1984, this Arbitrator finds the following questions to be of primary importance:

1) Whether the following occurrences are "transactions", within the definition of *New York Dock II*, Appendix III;

a) Greyrock Trucking firm taking over hauling of the limerock.

b) Change of working conditions. (Moonlighting prohibition), as a result of the Operational Bulletin dated August 26, 1977.

c) The merger between ARCO and the Anaconda Company with the subsequent acquistion of control and ownership of the Butte, Anaconda and Pacific Railway.

d) The movement of the dryer and lime to Butte in 1982.

e) Consolidation of ARCO employees as represented by letter dated January 16, 1980, signed by the then President and General Manager of the Butte, Anaconda and Pacific Railway, Leo V. Kelly.

f) Butte Hill work diverted to trucks.

g) Trucks hauling "precips" to Butte dryer.

h) The incident involving Track No. 1 a the coalpile.

i) The diversion of the chlorine used for the city sewer system to trucks.

j) Burnt lime hauling incident which resulted in a diversion of work.

k) Incidents involving switching and weighing of cars.

l) Leasing of Track No. 6 (Burlington Northern).

m) Diverting yard work to road crews in both seniority districts, (Rocker and Anaconda).

n) The elimination of regular assignments as a result of Operational Bulletins dated February 1, 1982, and February 3, 1982.

2. Whether the moonlighting prohibition referred to in Paragraph 1(b) above is an "incident in anticipation of a transaction" as defined in § 10, Appendix III of *New York Dock II*.

3. What is the effect of the May 29, 1981, unemployment compensation (Cantrill) agreement?

4. What date is applicable for tolling the time provisions of Appendix III, *New York Dock II* relative to the claims in this matter?

5. Whether the BA&P has complied with the provisions of § 4, Appendix III, *New York Dock II* as to each of the occurences set out in Paragraph 1 above.

6. What is the effect of § 10, Appendix III, *New York Dock II* as it relates to application of *New York Dock II* benefits to pas and present employees of BA&P.

7. Whether a penalty against the BA&P is appropriate.

8. Whether past employees, who resigned without knowledge of the possible availablity of *New York II* benefits, are entitled to benefits and, if so, to what extent.

The above enumeration of issues, while not meant to be exclusive, is viewed as the substance of the initial hearing under the bifurcated proceeding described herein. It is anticipated that, if a ruling upon such issues requires, the Arbitrator shall order the BA&P to initiate action pursuant to § 4, Appendix III, *New York Dock II* as to each of those occurences, which are found to be "transactions". From such action, the parties shall be

in a more realistic position to identify the proper claimants.

For the reasons stated herein, this Arbitrator finds that the Motion to Compel Disclosure of BA&P is premature and, therefore, should be denied at this time.

IT IS THEREFORE ORDERED that the Motion for Bifurcation of Issues of the UTU be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the Motion to Compel Disclosure of BA&P be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the parties be prepared to present evidence and argument on each of those issues set forth herein at that hearing to be held commencing January 16, 1984, at Anaconda, Montana. In the event that either party desires to present additional issues, notice thereof shall be given this Arbitrator and opposing counsel on or before the 30th day of December, 1983. Such notice shall contain a complete description of the issue, the names, titles, addresses and summary of testimony of each witness who shall testify as to such issue and include copies of any and all exhibits which shall be offered in support of the offering party's position.

DATED this 15th day of December, 1983.

/s/ Jack W. Cassle
JACK W. CASSLE
Arbitrator

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 88-7138
ICC No. 28490

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, represented by BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF AIRLINE CLERKS and BROTHERHOOD OF RAILWAY CARMEN,
Petitioner,

v.

UNITED STATES OF AMERICA;
INTERSTATE COMMERCE COMMISSION;
Respondents,

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY (BA&P),
Respondent-Intervenor.

CA No. 88-7162
ICC No. 28490

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, represented by UNITED TRANSPORTATION UNION,
Petitioner,

v.

UNITED STATES OF AMERICA;
INTERSTATE COMMERCE COMMISSION,
Respondents.

CA No. 89-70504
ICC No. 28490

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, represented by BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, BROTHERHOOD OF AIRLINE CLERKS and BROTHERHOOD OF RAILWAY CARMEN and UNITED TRANSPORTATION UNION,

Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,

Respondents.

ORDER

[Filed Aug. 21, 1991]

Before: BROWNING, CANBY AND TROTT, CIRCUIT JUDGES:

The petition for rehearing is denied.

APPENDIX M

[Service Date Apr. 28, 1987]

INTERSTATE COMMERCE COMMISSION

Docket No. AB-1 (Sub-No. 83)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—
NEAR DUBUQUE and OELWEIN, IA

Docket No. AB-1 (Sub-No. 113)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT—
BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: April 17, 1987

The Commission accepts jurisdiction to review but denies a petition seeking review of an arbitration award of claims under employee protective conditions imposed in these abandonments. Standards are established for reviewing arbitration decisions.

Stuart F. Gassner and *Christopher A. Mills* for Chicago and North Western Transportation Company.

Michael S. Wolly and *Gregory K. McGillivary* for International Brotherhood of Electrical Workers.

DECISION

BY THE COMMISSION:

BACKGROUND

By decisions served January 28 and November 17, 1981, respectively, the Chicago and North Western Transportation Company (CNW) was authorized, under 49 U.S.C. 10903, to abandon rail lines between Dubuque and Oelwein, IA, and between Oelwein, IA, and Randolph, MN. In both abandonments, we imposed the employee protection conditions in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (*Oregon III*).

On December 15, 1982, as a result of the above-described abandonments, CNW abolished an electrician's job at Oelwein held by Mr. Daniel Scheele. Mr. Scheele exercised his seniority rights and was awarded another job in CNW's Western Division. In February 1983, Mr. Scheele moved his family to Chardon, NE. However, he was unable to sell his home in Oelwein until July 26, 1984, at an allegedly depressed price of $40,000.

Through the International Brotherhood of Electrical Workers (IBEW), Mr. Scheele presented claims to CNW for *Oregon III* benefits for moving expenses and loss incurred from sale of his home. Among other moving expenses, he claimed $500 for a "lace curtain" allowance"[1] under Article I, Section 9 of *Oregon III*. He also claimed compensation for loss incurred on the sale of his home. The alleged loss was based on the difference between the appraised value of the home in July 1980, and the reduced value of the home when it was sold in 1984. Mr. Scheele also claimed that CNW should pay mortgage interest and realtor's commission as part of compensation

[1] According to CNW, a "lace curtain allowance" represents expenses that may be incurred in preparing a newly-purchased home for occupancy, *e.g.*, installing new curtains.

for loss. In addition, Mr. Scheele claimed that he was entitled to judgment-type interest on the entire amount of his claim. CNW disputed the claims; they were submitted subsequently to a Board of Arbitration (Board) under Article I, Section 11 of *Oregon III*.

As the Board's decision notes, IBEW and CNW used Article I, Section 12 procedures to resolve the valuation issue over Mr. Scheele's home. IBEW presented an appraisal valuing the home at $49,000 as of July 1980. IBEW selected this date because it allegedly conformed the requirement in Section 12 that an appraisal be at a "date sufficiently prior to the date of the transaction as to be unaffected thereby." IBEW asserts that July 1980 coincided with the time period that CNW filed its first abandonment application, which started the chain of events leading to the elimination of Mr. Scheele's job. CNW, on the other hand, appraised the home at $44,000 as of December 1982, when Mr. Scheele's job was abolished, and when he was, in fact, adversely affected. IBEW and CNW then selected a neutral appraiser. The neutral appraiser decided that both appraisals were applicable.

According to the arbitration decision, the parties agreed that the Board would select one of the appraisals as the basis for Mr. Scheele's Section 12 benefits. The Board found that the dates of the transactions that ultimately caused the elimination of Mr. Sheele's job occurred in 1981 when CNW was granted authority to abandon the Oelwein-Dubuque and Oelwein-Randolph lines. Accordingly, the Board determined that the July 1980 appraisal would be used, because it comported more closely with the "date sufficiently prior" requirement of Section 12.

CNW sought to limit the Board's action to resolving the issue of fair market value of Mr. Scheele's home. However, the Board rejected CNW's position and, instead, agreed with IBEW that Mr. Scheele was also entitled to "associated benefits" covered by sections of Ar-

ticle I other than Section 12, including moving expenses provided in Section 9.

The Board identified three expense categories under Section 12. It found that the loss on the sale of Mr. Scheele's home was $9,000, the largest monetary item claimed. It also granted claims of associated costs for mortgage interest ($3,652.44) and realtor's commission ($2,400) as benefits under Section 12.

For the Section 9 awards, the Board directed the parties to negotiate the payment of the lace curtain allowance. Apparently, the parties agred to this $500 payment, for the final award grants the allowance "as a benefit historically conferred by many agreements." Moving expenses allowed totalled $1,001.52.

The Board also granted the claim for interest "for the monetary benefits heretofore withheld and now awarded." It stated that, "[P]ayment of interest is proper and appropriate under the circumstances and not violative of the spirit and intent of the applicable provisions of [*Oregon III*]." Total interest allowed was $1,324.02. The total award was $17,397.98.

CNW here seeks Commission review of the Board's decision. The IBEW opposes CNW's request.

CNW argues that we have jurisdiction to review the Board's decision under 49 U.S.C. 10903(b)(2), which authorizes the Commission to impose labor protection in rail abandonments. It contends that the arbitration procedures in Section 11 amount to a delegation of authority from the Commission to the Board to resolve disputes arising under *Oregon III*. Accordingly, it asserts that there exists an implicit right to appeal a disputed decision to this Commission. CNW acknowledges, however, that such an appeal is not expressly provided by statute.[2]

[2] In view of uncertainty over where to appeal the arbitral decision, CNW has also sought judicial review of the Board's decision. It has requested that the court hold its review in abeyance pending

CNW contends that the Board erred in granting the "lace curtain allowance." It argues that expenses covered by Section 9 are those incurred for moving an employee's household, traveling expenses for the employee and his family, living expenses, and actual wage loss for up to 3 days. No mention is made of expenses incurred in decorating a new home, such as those for installing new curtains. CNW claims that including "a lace curtain allowance" as a moving expense is error.[3]

Next, is claims that the Board lacked jurisdiction to require payment of claims for Mr. Scheele's loss from sale of his home. CNW argues that disagreements over the amount of loss from the sale of a home are to be resolved under Section 12 of *Oregon III*. However, it argues that these disputes are not to be arbitrated under Section 11, absent a railroad's consent. CNW states that it consented here only to have the Board determine the date to be used to ascertain the value of Mr. Scheele's home. Also, it claims the Board lacked jurisdiction to require payment of mortgage interest and real estate commission as part of compensation for loss on the sale of Mr. Scheele's home.

Finally, CNW disputes the Board's decision to award judgment-type interest. It points out that there is no provision in *Oregon III* for awarding interest to claimants. To do so, it alleges, is beyond the scope of *Oregon III* and is thus improper.

CNW requests that we review the Board's decision and set aside the award as being beyond its judisdiction under

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our decision. *See Chicago and North Western Transportation Company* v. *United States and Interstate Commerce Commission* No. 86-1394 (7th Cir., filed March 12, 1986). This decision should provide guidance to parties regarding future appeals of arbitration decisions and avoidance of duplicative filings.

[3] CNW acknowledges, however, that a "lace curtain allowance" may be provided for separately in collective bargaining agreements.

Section 11. In the alternative, CNW requests that we reduce the award by $7,876.46, representing those claims that it asserts the Board granted improperly.

IBEW opposes CNW's petition, contending that the Interstate Commerce Act and the arbitration provisions of *Oregon III* provide no right to appeal the Board's arbitration award to the Commission. In this regard, it disputes CNW's underlying assertion that the Board acted under a delegation of authority from the Commission. It argues further that CNW's request is untimely and contrary to Commission precedent not to become involved in disputes between carriers and employees arising out of protective conditions where arbitration is prescribed as the mode of redress.

DISCUSSION AND CONCLUSION

The principal issue raised by CNW's petition is our jurisdiction to review the Board's award to Mr. Scheele. The Commission has consistently refused to become involved in individual employee disputes arising under imposed employee protection conditions, deferring instead to arbitration for determination of causation issues and factual questions.[4] Now for the first time, we have been asked to review an arbitration decision awarding benefits under Commission-imposed employee protection conditions.

A number of questions must be answered to resolve this matter. First, we must determine whether we have authority to review arbitral decisions. If we find we have such authority, we must decide under what standards we will do so. Finally, we must apply those standards to the facts of this case.

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[4] *See, e.g., Brotherhood of Locomotive Engineers* v. *I.C.C.*, No. 82-1944 (D.C. Cir. January 9, 1987); *Walsh* v. *I.C.C.*, 723 F.2d 570, 574 (7th Cir. 1983); *Bell* v. *Western Maryland Railroad Company*, 366 I.C.C. 64, 68 (1982).

1. *I.C.C. authority to review arbitration decisions.* As noted earlier, there is no specific Commission precedent to rely on in resolving this issue. However, actions of the former Civil Aeronautics Board (CAB) are useful guidance. The court cases affirming CAB review of arbitral awards strongly suggest that we are entitled, if not required, to review the arbitration decision in this case.

The CAB for many years imposed Labor Protective Provisions (LPP's) in merger agreements.[5] Airline mergers regulated by the CAB were not subject to statutory requirements for employee protection. Thus, the CAB did not have specific statutory authority to impose employee protection conditions, nor did it have authority to review arbitration decisions. Nevertheless, the CAB directed airline employees to arbitrate disputes, recognizing that the arbitrator's role in resolving disputes under collective bargaining agreements is comparable to the arbitrator's role in resolving disputes under the LPP's. *See Pan American World Airways* v. *CAB*, 683 F.2d 554, 559 (D.C. Cir. 1982).

The CAB assumed responsibility for reviewing arbitrators' decisions under the LPP's, and its assumption of authority to review arbitrators' decisions was upheld by the courts. *Id.* Indeed in *Wallace* v. *Civil Aeronautics Br.*, 755 F.2d 861 (11th Cir. 1985), the court recognized that the CAB's review of arbitration decisions under the LPP's was preferable to court review for several reasons.[6] First, the CAB's foremost concern was airline

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[5] *See United Capital Merger Case*, 33 C.A.B. 307, 323 (1961). The LPP's are adapted from the Washington Job Protection Agreement of 1936, the same source for the protective conditions we impose in abandonments. *See Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76, 81 (1977).

[6] The authority for the courts to review arbitration decisions was established in the so-called *Steelworkers Trilogy* involving arbitration decisions issued under collective bargaining agreements. *United*

regulation and not promotion of labor policy for its own sake. Second, the CAB's perspective of the dispute differed from that of a court reviewing an arbitration decision on an unfamiliar collective bargaining agreement. The CAB formulated the LPP's, and, therefore, had the best understanding of what they meant. Finally, in interpreting decisions of arbitrators issued under procedures it established, the court noted that the CAB was not interfering with the self-governing that is present in collective bargaining agreements. *Wallace*, *supra*, 755 F.2d at 865.

Thus, precedent exists for a Federal agency to impose employee protection conditions and to review arbitration decisions, even where no specific statutory authority exists. Like the CAB, this Commission has no specific statutory authority to review arbitrators' decisions. However, unlike the CAB, we are required by statute to impose labor protective conditions in authorizing abandonments and discontinuances (49 U.S.C. 10903(b)(2)) and in authorizing rail mergers and consolidations (49 U.S.C. 11347). Thus, proper implementation of the statute may compel our review when an arbitration decision raises issues concerning our statutory responsibility to impose labor protection. Examples include questions as to whether collective bargaining agreements implementing a transaction conform with statutory requirements for protection,[7] and questions defining the scope or coverage of imposed conditions.[8]

We approved these abandonments and formulated the *Oregon III* labor protection provisions at issue here.

Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrier & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[7] *See Norfolk & Western R.R.* v. *Nemitz*, 404 U.S. 37 (1971).

[8] *See Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Transp. Co.*, 366 I.C.C. 857, 860-861 (1983).

Therefore, we know best what we intended *Oregon III* (and our abandonment decisions) to mean. Because this action raises issues within our special competence and expertise, it makes sense that we resolve, in the first instance, whether our intent has been carried out. *Wallace, supra*, 755 F.2d at 865; *Illinois Term. R. Co.* v. *ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982); *McKeon* v. *Toledo*, 595 F.Supp. 766, 769-780 (D. Ill. 1984). See generally primary jurisdiction cases such as *Hewitt-Robins, Inc.* v. *Eastern Freight Ways*, 371 U.S. 84, 89 (1962) and *Augsberger* v. *Brotherhood of Locomotive Engineers*, 510 F.2d 853, 860 (8th Cir. 1975).

IBEW challenges CNW's *petition for administrative review* on grounds that there is no specific authority permitting it. But, as indicated above, the courts have affirmed the CAB's right to overturn arbitration decisions even though that agency was without explicit authority to review them. Moreover, our decision to review this arbitral award is firmly grounded in the Interstate Commerce Act. We impose labor protective conditions pursuant to our explicit statutory authority in 49 U.S.C. 10903 and 11347. In addition, 49 U.S.C. 10701(b) permits the filing of "a complaint about a violation of this subtitle." CNW's request for administrative review should be treated as a complaint; in essence, it is arguing that the arbitrators have misconstrued the act and our labor protection conditions. Finally, 5 U.S.C. 554(e) confers on us the right to issue declaratory orders to remove uncertainties about terms of art within our special province. *Illinois Term., supra*, 671 F.2d at 1216. These provisions provide an adequate basis for us to review the arbitrators' decision.[9]

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[9] IBEW also asserts that CNW's petition was not filed within the 20 days provided in our rules for petitions seeking administrative review. We disagree that CNW's petition is out of time. CNW has explained that it did not file within 20 days of receiving the arbitration decision because the copy it received on January 21st was

IBEW's reliance on the language in *Oregon III* providing that arbitration decisions are "final, binding, and conclusive" similarly is unavailing. First, the CAB's LPP's, like our employee protection conditions, stated that arbitration decisions "shall be final and binding." See *Pan American, supra*, 683 F.2d at 556 n. 2. Second, IBEW ignores the fact that, regardless of whether they are "final, binding and conclusive," arbitration decisions are subject to at least limited *judicial* review." [10] See, *e.g.*, *Steelworkers Trilogy, supra.* Principles of judicial economy and efficiency would be served by providing the courts with the benefit of our expertise prior to the time they engage in their review.

Nor can IBEW successfully rely on the Commission cases that provide for mandatory arbitration of individual disputes between a railroad and its employees. *E.g., Bell* v. *Western Maryland, supra; Leavens* v. *Burlington Northern*, 348 I.C.C. 962 (1977). These cases do not address the quesetion presented here: what happens *after* an issue has been submitted to arbitration. Nor do they indicate that we lack the authority to review arbitration decisions. We continue to believe that mandatory arbitration is appropriate for the final resolution of causation issues (*i.e.* was an individual seeking protection an

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not signed by the union member of the Board. Its petition was filed on March 6th, only one day after receiving a fully executed copy. It is customary that all members of arbitration boards sign arbitration decisions. Since CNW filed its petition so promptly after receiving a fully executed copy, we will accept it.

[10] Our jurisdiction to review an arbitral award rendered under labor protection conditions we imposed is being considered in *United Transp. Union* v. *Norfolk & Western Railway Co., et al.* No. 86-5003 (D.C. Cir. argued February 13, 1987. There, the UTU asserts that the district court had jurisdiction to review the arbitral award. The railroads contend that the award was reviewable in the first instance by the Commission with subsequent review in the Courts of Appeal under the Hobbs Act, 28 U.S.C. 2341, *et seq.* The Commission is not participating in the appeal.

"employee" covered by labor protection and was his employment status "affected" by a merger or abandonment). *See, e.g. Leavens, supra,* 348 I.C.C. at 975. However, nothing in the mandatory arbitration requirement forecloses us from considering whether our abandonment decisions (and labor protection conditions) have been properly interpreted or carried out as we intended.[11] Accordingly, we find that we have authority to review arbitrators' decisions.

2. *The standard of review.* Under the *Steelworkers Trilogy,* courts generally set an extremely limited scope of review of arbitration decisions. They confine their scrutiny to determining whether an award was procedurally fair and impartial. Awards are not vacated because of an alleged substantive mistake, unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority. *Loveless* v. *Eastern Airlines, Inc.,* 681 F.2d 1272, 1275-1276 (11th Cir. 1982).

The special role of labor arbitrators in resolving disputes was discussed in *American Mfg. Co., supra,* 363 U.S. at 561-562. There, the Supreme Court recognized that arbitration was superior to court litigation for resolving labor disputes. The Court noted that the arbitrator performs functions not normal to courts and is able to fashion judgment outside of a court's competence. The arbitrator is not confined to the express provisions of collective bargaining agreements, but may also consider

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[11] As the court recently explained in *Brotherhood of Locomotive Engineers* v. *ICC,* 808 F.2d 1570, 1579 n. 75 D.C. Cir. 1987).

> Where, as here, the conditions to which the Commission subjected the railroads specifically require them to submit to arbitration as a prerequisite as to its approval of the transaction proposed, the Commission has in fact exercised jurisdiction . . . Arbitration is a legitimate means of resolving labor disputes and does not divest the Commission of its jurisdiction.

his personal knowledge of the practices of the industry, even though they are not expressed specifically in the agreement itself. His analysis of a grievance, therefore, will involve additional factors such as productivity, morale, and whether his decision will heighten or diminish tensions. The personal knowledge of the arbitrator, particularly of industry and labor practices, thus gives him special experience and competence in resolving disputes. Accordingly, the Supreme Court concluded that an arbitrator's decision on the merits and his interpretation of the collective bargaining agreement are to be given extreme deference, even though a court could interpret an agreement differently. Also, courts are to give a strong presumption of finality to an award. *Enterprise W. & C. Corp., supra*, 363 U.S. at 597-598.

As indicated above, the *Steelworkers Trilogy* established a narrow scope of judicial review, deferring to the arbitrator especially on the merits of the claim. Those standards are consistent with the reasons arbitration procedures are prescribed to resolve disputes. Arbitrators are most familiar with the complexities of labor laws and peculiarities of disputes involving railroad employees. *Leavens, supra*, 348 I.C.C. at 975 (1977). We also recognize the arbitrator's special role in resolving disputes exercising authority derived from the protection conditions me impose and in using their knowledge and experience of industry practices in interpreting the conditions.

Therefore, we will limit our review of arbitrators' decisions to recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions. This approach is consistent *both* with *Wallace* and *Steelworkers Trilogy.*

We do not intend to review arbitrators' decisions on issues of causation, the calculation of benefits, or the resolution of other factual questions. Accordingly, we will

not become a regular participant in the process as reviewer of arbitration decisions. In applying this standard in future cases, we will treat summarily those that do not meet this standard of review.

3. *Application to this case.* Because this is the first case of this type that we have been asked to review, and we had no standards established, we offer our detailed analysis below.

We conclude that CNW has raised no issues that warrant reevaluation of the Board's decision under the narrow scope of review established in the case law discussed in the prior section.[12] We have considered whether the decision reflects a misinterpretation or misapplication of *Oregon III*.

First, we consider whether the award to Mr. Scheele is based on a proper interpretation of the *Oregon III* conditions (*i.e.*, a substitute for the collective bargaining agreement conditions). The awards that CNW challenges are not specifically provided for in *Oregon II*. However, as we discussed above, the Board granted Mr. Scheele's claims as being within the context and spirit of the *Oregon III* conditions. The lace curtain allowance was granted as a moving expense under section 9 as a benefit accorded in the industry to employees granted *Oregon III* protection. Reimbursement of a real estate commission and mortgage interest was granted as a section 12 benefit. Judgment-type interest was granted as not being contrary to *Oregon III*. Given the leeway the Board has to consider industry practice, we cannot find that the award failed to draw its essence from the letter and purpose of *Oregon III*. *See Enterprise W. & C. Corp.*, *supra*, 363 U.S. at 597. This is not to say that we would conclude that the Board's denial of any of these three items would be in error. Put another way, so long as the Board

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[12] CNW does not even allege that the award was irrational or without foundation.

is intepreting and applying the *Oregon III* conditions and not dispensing its "own brand of industrial policy" (*ibid.*), we would not object to the Board's granting *or* denying awards on these three particular items.

Second, we must consider whether the Board acted within its authority under *Oregon III*. We reject CNW's claim that the Board exceeded its authority in setting the value for Mr. Scheele's home. The Board's opinion shows that the CNW and IBEW followed the procedures in Section 12 of *Oregon III* to establish the value of the home. The parties first attempted to resolve the dispute at a conference. When an agreement could not be reached, the dispute was referred to a panel consisting of representatives from IBEW and CNW, who then selected a neutral appraiser. Rather than resolving the valuation issue, the Board of Appraisers reached two valuations: one for the value as of July 1980, and the other for the value as of December 1982. The parties then agreed that the Board established under Section 11 would decide which appraisal would be used to determine the loss on sale of Mr. Scheele's home.

Even though Section 11 excludes valuation determinations from those disputes that the Board could resolve, the parties clearly and unmistakenly consented to having the Board resolve this matter. The consent thus overcame the restriction in Section 11. *See AT&T Tech. Inc.* v. *Communications Workers*, 106 S.Ct. 1415, 1418 (1986). The Board was then able to resolve other disputed claims under section 12 for the real estate commission and mortgage interest that were determined to be part of the loss incurred by Mr. Scheele from sale of his home, as well as claims for a lace curtain allowance and judgment-type interest. Thus, the Board was properly acting within the scope of the *Oregon III* conditions and the agreement of the parties in granting claims of Mr. Scheele.

In conclusion, we cannot find that the benefits fail to draw their essence from the *Oregon III* conditions im-

posed in the proceedings, or that the Board's action was outside its authority under Article 1, Section 11 of *Oregon III* conditions imposed in the proceedings, or that the Board's action was outside its authority under Article 1, Section 11 of *Oregon III*. Accordingly, we deny CNW's petition seeking our review of the Board's award to Mr. Scheele.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. CNW's petition seeking our review of the Board of Arbitration award to Mr. Daniel Scheele is accepted but is denied.

2. This decision is effective on May 29, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

NORETA R. MCGEE
Secretary

(SEAL)

APPENDIX N

STATUTES RELIED UPON

I. INTERSTATE COMMERCE ACT, 49 U.S.C. Section 10101 *et seq.* (Excerpts):

A. 49 U.S.C. § 11343

§ 11343. Consolidation, merger, and acquistion of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under sub-

chapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e) (1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consoli-

dation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

§ 11344. Consolidation, merger, and acquistion of control; general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer

of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the

Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by

shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

C. 49 U.S.C. § 11345

§ 11345. Consolidation, merger, and acquisition of control; rail carrier procedure

(a) If a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is involved in a proposed transaction under section 11343 of this title, this section and section 11344 of this title also apply to the transaction. The Commission shall publish notice of the application in the Federal Register by the end of the 30th day after the application is filed with the Commission and after a certified copy of it is furnished to the Secretary of Transportation. However, if the application is incomplete, the Commission shall reject it by the end of that period. The order of rejection is a final action of the Commission under section 10327 of this title. The published notice shall indicate whether the application involves—

(1) the merger or control of at least two class I railroads, as defined by the Commission, to be decided within the time limits specified in subsection (b) of this section;

(2) transactions of regional or national transportation significance, to be decided within the time limits specified in subsection (c) of this section; or

(3) any other thransaction covered by this section, to be decided within the time limits specified in subsection (d) of this section.

(b) If the application involves the merger or control of two or more class I railroads, as defined by the Commission:

(1) Written comments about an application may be filed with the Commission within 45 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 90th day after publication of notice under that subsection.

(3) The Commission must conclude evidentiary proceedings by the end of the 24th month after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 180th day after the date on which it concludes the evidentiary proceedings.

(c) If the application involves a transaction other than the merger or control of at least two class I

railroads, as defined by the Commission, which the Commission has determined to be of regional or national transportation significance:

(1) Written comments about an application may be filed with the Commission within 30 days after notice of the application is published under subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission shall require that applications inconsistent with an application, notice of which was published under subsection (a) of this section, and applications for inclusion in the transaction, be filed with it and given to the Secretary of Transportation by the 60th day after publication of notice under that subsection.

(3) The Commission must conclude any evidentiary proceedings by the 180th day after the date of publication of notice under subsection (a) of this section. The Commission must issue a final decision by the 90th day after the date on which it concludes the evidentiary proceedings.

(d) For all applications under this section other than those specified in subsections (b) and (c) of this section:

(1) Written comments about an application may be filed with the Commission within 30 days after notice of the application is published under

subsection (a) of this section. Copies of such comments shall be served on the Secretary of Transportation and the Attorney General, each of whom may decide to intervene as a party to the proceeding. That decision must be made by the 15th day after the date of receipt of the written comments, and if the decision is to intervene, preliminary comments about the application must be sent to the Commission by the end of the 15th day after the date of receipt of the written comments.

(2) The Commission must conclude any evidentiary proceedings by the 105th day after the date of public of notice under subsection (a) of this section. The Commission must issue a final decision by the 45th day after the date on which it concludes the evidentiary proceedings.

(e) If the Commission does not issue a decision that is a final action under section 10327 of this title, it shall send written notice to Congress that a decision was not issued and the reasons why it was not issued.

(f) The Commission may waive the requirement that an initial decision be made under section 10327 of this title and make a final decision itself when it determines that action is required for the timely execution of its functions under this subchapter or that an application governed by this section is of major transportation importance. The decision of the Commission under this subsection is a final action under section 10327 of this title.

D. 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier

to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if any employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

E. 49 U.S.C. § 11351

When cause exists, the Interstate Commerce Commission may make appropriate orders supplemental to an order made in a proceeding under sections 11342-11345 and 11347 of this title.

II. RAILWAY LABOR ACT, 45 U.S.C. § 153 FIRST (q):

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its boards of directors or its receiver or receivers, trustee or

trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filed by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fails to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and desigation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be inde-

pendent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers, that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with section 2 hereof and which represent employees in engine, train, yard, or hostling service; Provided, however, That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Section division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph

employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, in failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to

the employee or employees and the carriers or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request

of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the

appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in the United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may set aside, in whole or in part, or remanded to the division, for failure of the division to comply

with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several division or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Therefore each division

shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, eand officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon dis-

putes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same process. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) hereof, with respect to a division of the Adjustment Board.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon which such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such

carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishing of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he was determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint

such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day, named. Compliance with such awards shall be enforcable by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.